Supreme Court, U.S.
FILED

01-71 JUL 10 2001
No. 01-

IN THE

Supreme Court of the United States

HONEYWELL INC. and JOHNSON CONTROLS, INC.,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DOUGLAS A. DARCH
Counsel of Record
WILLIAM F. DUGAN
SEYFARTH SHAW
Attorneys for Petitioners
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

167972

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

123 pp
$80

QUESTION PRESENTED

Whether the due process clause and this Court's decisions in *Martin v. Wilks*, 490 U.S. 755 (1989), and *Local No. 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986), permit a court to order that third parties, against whom no finding of illegality has been made, be joined as defendants and bound to a twenty year old consent decree, to which those third parties never consented, for the sole purpose of performing affirmative acts imposed by the decree?

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS AND RULE 29.6 STATEMENT

The Petitioners in this case are Honeywell Inc. and Johnson Controls, Inc. Some twenty years after the District Court entered a consent decree to which Petitioners were not a party, and in the absence of any finding of illegality on the part of Petitioners, Petitioners were involuntarily joined as defendants in the District Court. Petitioners were appellants in the Court of Appeals.

The Equal Employment Opportunity Commission was the plaintiff and George D. Edwards, et al. were intervening plaintiffs in the District Court, and both parties were appellants and cross-appellees in the Court of Appeals.

The United Association of Journeyman and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 120, was a defendant in the District Court and an appellee in the Court of Appeals.

There were no other parties in the Court of Appeals.

Petitioner Honeywell Inc. is a wholly owned subsidiary of Honeywell International Inc., which is a publicly traded company. State Street Bank owns 10% or more of the stock of Honeywell International Inc.

Petitioner Johnson Controls, Inc. does not have a parent company and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings in the Court of Appeals and Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	vii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision, Rules and Statutes Involved	1
Statement of the Case	2
A. Introduction	2
B. Proceedings Below/Facts	3
1. The Origin Of This Lawsuit	3
2. The District Court Holds Local 120 In Civil Contempt For Its Failure To Comply With The Terms Of The Consent Decree	4

Contents

Page

3. The District Court Joins Honeywell, Johnson Controls And The "Other Contractors" 4

4. The Court of Appeals Affirms The District Court's Joinder Of Honeywell and Johnson Controls 6

Reasons for Granting the Writ 7

The Court Of Appeal's Decision Conflicts With This Court's Decisions And Thereby Permits Hundreds Of Consent Decrees To Bind Innocent Non-Consenting Parties 9

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

C. Martin Lawyer, III v. Department of Justice, et al., 521 U.S. 567 (1997) 10

EEOC v. Shell Oil Co., 466 U.S. 54 (1984) 11

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) 10

Local No. 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland, 478 U.S. 501 (1986) ..... *passim*

Martin v. Wilks, 490 U.S. 755 (1989) ..... *passim*

United States Constitution:

U.S. Const. amend. V 1

Rules:

Federal Rule of Civil Procedure 19(a) 1, 5

Federal Rule of Civil Procedure 21 ..... 1, 5

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e-2(c)(1) 1

42 U.S.C. § 2000e-2(c)(2) 1

42 U.S.C. § 2000e-5(g)(1) 1

TABLE OF APPENDICES

Page

Appendix A — Opinion And Judgment Of The United States Court Of Appeals For The Sixth Circuit Dated, Decided And Filed December 15, 2000 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Northern District Of Ohio, Eastern Division Dated And Filed June 25, 1998 ..... 26a

Appendix C — Order Of The United States District Court For The Northern District Of Ohio, Eastern Division Dated And Filed February 28, 1993 ... 65a

Appendix D — Order Of The United States District Court For The Northern District Of Ohio Dated And Filed October 29, 1992 ..... 72a

Appendix E — Consent Decree Of The United States District Court For The Northern District Of Ohio, Eastern Division Dated And Filed January 20, 1972 ..... 83a

Appendix F — Order Of The United States Court Of Appeals For The Sixth Circuit Denying Petition For Rehearing Dated And Filed April 11, 2001 ..... 101a

Appendix G — Constitutional Provision, Rules and Statutes Involved 103a

OPINIONS BELOW

The opinion of the Court of Appeals, Pet. App. A at 1a, is officially reported at 235 F.3d 244. The Order of the Court of Appeals denying certain parties' petitions for rehearing en banc, Pet. App. F at 101a, is officially reported at 249 F.3d 1085. The Opinion and Order of the United States District Court for the Northern District of Ohio, Eastern Division, Pet. App. B at 26a, is officially reported at 9 F. Supp.2d 836. The relevant Orders issued by the District Court, Pet. App. C at 65a, Pet. App. D at 72a and Pet. App. E at 83a, are unreported.

STATEMENT OF JURISDICTION

The Court of Appeals issued its opinion on December 15, 2001, Pet. App. A at 2a. On April 11, 2001, the Court of Appeals denied certain parties' petitions for rehearing en banc, Pet. App. F at 101a-102a. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, RULES AND STATUTES INVOLVED

U.S. Const. amend. V

Federal Rule of Civil Procedure 19(a)

Federal Rule of Civil Procedure 21

42 U.S.C. § 2000e-5(g)(1)

42 U.S.C. §§ 2000e-2(c)(1) and (c)(2)

The relevant portions of which are set forth in Pet. App. G at 103a.

STATEMENT OF THE CASE

A. Introduction

Some twenty years after a consent decree was entered, the District Court joined Petitioners Honeywell Inc. ("Honeywell") and Johnson Controls, Inc. ("Johnson Controls") to this lawsuit for the sole purpose of imposing upon them affirmative obligations contained in a Consent Decree, despite the fact no finding of illegality of any sort had been entered against them and they did not consent to the decree. Specifically, the District Court ordered Honeywell and Johnson Controls to compile and maintain information, and granted the Equal Employment Opportunity Commission ("EEOC") and a class of plaintiff-intervenors unrestricted access to the employment books and records of Honeywell and Johnson Controls. The Court of Appeals affirmed the imposition of these obligations on Honeywell and Johnson Controls despite decisions of this Court barring this practice.

The ability of the federal courts to redress discriminatory employment practices through consent orders is well established. The authority of the courts, however, does have its limits. This Court has directed the courts to strike a balance between the redress of discrimination and the rights of innocent third parties. That balance, this Court has held, prohibits the conscription of citizens and their compulsory participation in specified activities where the citizens at issue have not even been accused of discriminatory practices, much less convicted of engaging in such practices. The courts below failed to follow this Court's holdings.

B. Proceedings Below/Facts

1. The Origin Of This Lawsuit

In 1968, the United States Department of Justice ("Department") filed a complaint against the United Association of Journeymen and the Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local No. 120 ("Local 120") alleging Local 120 unlawfully discriminated against blacks in violation of Title VII of the Civil Rights Act of 1964 when referring pipefitters from its hiring hall to the contractors in the Cleveland, Ohio area.

In 1972, the Department, Local 120 and two intervening defendants, the Mechanical Contractors Association ("MCA") and the Refrigeration and Air-Conditioning Association (the "RACA"), entered into a Consent Decree approved by the District Court, Pet. App. E at 83a. The Consent Decree *inter alia* required Local 120 to collect information and maintain certain records to enable the Department to monitor whether Local 120 was operating its hiring hall on a nondiscriminatory basis, Pet. App. E at 85a-86a, 89a-90a, 96a. It is undisputed that neither Honeywell nor Johnson Controls, nor any predecessor or related entity, was a party to the lawsuit or to the Consent Decree, or had knowledge of the litigation or the Consent Decree.

2. The District Court Holds Local 120 In Civil Contempt For Its Failure To Comply With The Terms Of The Consent Decree

In 1987, the District Court granted a motion by a class of black pipefitters to intervene in the lawsuit. Thereafter, the black pipefitters moved for an order to show cause why Local 120 should not be held in civil contempt for its failure to comply with the Consent Decree. In December 1990, the EEOC joined the black pipefitters' motion for an order to show cause.

In 1992, the District Court held Local 120 in civil contempt because, *inter alia*, it had failed to comply with the record keeping requirements of the Consent Decree. As requested by the EEOC, the District Court designated a U.S. Magistrate Judge to monitor the operation of the work referral system.

3. The District Court Joins Honeywell, Johnson Controls And The "Other Contractors"

Unbeknownst to Honeywell or Johnson Controls, the Consent Decree entered in 1972 required contractors who utilized Local 120's hiring hall to maintain certain records and provide the EEOC access to their employment records and books, Pet. App. E at 90a-91a, 96a.

In 1992, after it had held Local 120 in contempt and twenty years after the Consent Decree was entered, the District Court sent a Notice to a prospective defendant class of contractors, including Honeywell and Johnson Controls, stating: "[s]hould this court decide to grant plaintiff's [EEOC's] motion and certify this class, as a member of the

class you will be legally bound by any future orders of this court. This means that you could be subject to Section II, paragraph 7 and Section IV paragraph 14 of the original Consent Decree (discussed above) *and to contempt proceedings for failure to comply with these orders*" (emphasis added).

In response to this Notice, Honeywell and Johnson Controls successfully argued that the court could not certify a defendant class. Nonetheless, the District Court, *sua sponte* and pursuant to Fed. R. Civ. P. 19(a) and 21, ordered that Honeywell and Johnson Controls be joined as defendants in the lawsuit and bound to the Consent Decree.[1] On February 28, 1993, the District Court modified the Consent Decree and ordered the joined defendants, including Honeywell and Johnson Controls, to utilize certain forms for the requisite recordkeeping, to "permanently retain" copies of the completed forms and granted the EEOC and the black pipefitters the right to inspect and copy the forms, Pet. App. C at 65a-71a. On June 25, 1998, the district court entered a final Opinion and Order, Pet. App. B at 26a.

---

1. The District Court held joinder was necessary: (1) to secure compliance with the Consent Decree; (2) to avoid the impression of inconsistent obligations on the parties to the proceedings; (3) to insure that complete relief is granted prospectively to the EEOC and the black pipefitters; (4) to ensure that each contractor which utilizes the hiring hall operated by Local 120 receives qualified pipefitters; and (5) to ensure the successful operation of the Consent Decree, Pet. App. D at 75a.

4. The Court of Appeals Affirms The District Court's Joinder Of Honeywell and Johnson Controls

The Court of Appeals affirmed the District Court's decision to join Honeywell and Johnson Controls and thereby impose a Consent Decree on them. The Court of Appeals held that Honeywell and Johnson Controls could be bound to the Consent Decree, despite their objections to it and even though there had been no finding of illegality against them, because they had been able to challenge the EEOC's motion for class certification, and because the District Court only ordered prospective relief, *i.e.* future compliance with the Consent Decree, and, therefore, imposed no liability for past conduct, Pet. App. A at 19a. The Court of Appeals further held that joinder was necessary to ensure compliance with the Consent Decree and to ensure complete relief for the EEOC and the black pipefitters, Pet. App. A at 20a.

On April 11, 2001, the Court of Appeals denied certain parties' petitions for rehearing en banc, Pet. App. F at 101a-102a.

REASONS FOR GRANTING THE WRIT

This case has national importance because a federal court has involuntarily joined innocent third parties to a lawsuit — without any finding of wrongdoing on their part — and ordered them to perform affirmative obligations contained in a twenty year old Consent Decree to which the original parties to the litigation had previously agreed upon. Simply put, a federal court has subjected innocent third parties to its contempt powers if they fail to perform affirmative acts in accordance with an agreement negotiated and agreed to by strangers.

The Court of Appeals decision flies in the face of two decisions by this Court, namely *Martin v. Wilks*, 490 U.S. 755 (1989), and *Local No. 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986). In these cases, this Court separated consent decrees into two categories. In one category (not involved here) are consent decrees that affect third parties but impose no affirmative obligations on them. In the second category are consent decrees that require third parties to engage in affirmative acts. As to the latter category, this Court holds that a district court *cannot* impose obligations upon a person through a consent decree without that person's consent. As this Court noted, to do otherwise clearly violates a person's due process rights. *Martin v. Wilks*, 490 U.S. at 761-62; *Local No. 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, 478 U.S. at 528-30.

Notwithstanding this Court's clear admonitions, Honeywell and Johnson Controls have been ordered to comply with a Consent Decree to which they never consented and despite the fact no finding of unlawful conduct has been

entered against them. If the Court of Appeals decision is permitted to stand, the EEOC and the federal courts will have unfettered license to force third parties to undertake obligations contained in consent decrees when no judgment has been entered against those parties and when they have not consented to the obligations, as long as the conduct ordered by the decree is "prospective." By obliterating the distinction between the two classes of consent decrees, the District Court and Court of Appeals have nullified the adjudicative process, and thereby held that joined parties have no right to a hearing as to wrongdoing, as guaranteed by the United States' Constitution, but must comply with a consent decree agreed to by others. This standard completely eviscerates both *Martin v. Wilks* and *Local No. 93* and, therefore, the Petition should be granted.

THE COURT OF APPEAL'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS AND THEREBY PERMITS HUNDREDS OF CONSENT DECREES TO BIND INNOCENT NON-CONSENTING PARTIES

It is axiomatic that the constitutional authority of federal courts to impose civil obligations upon an individual is limited to two basic circumstances: (1) a judgment entered against the individual by the court after a full hearing on the issue at hand; and (2) enforcement of a consent decree to which the individual has agreed and which is thereafter entered by the court. Here, the courts below did neither. Rather, under the rubric of joinder, they imposed affirmative obligations upon Honeywell and Johnson Controls when no judgment of unlawful conduct was ever entered against them and they never agreed to the terms of the Consent Decree. This Court has explicitly held such action is improper.

In *Martin v. Wilks*, this Court observed that "[a] judgment or decree among parties resolves issues as among them, but does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. at 762. This observation was preordained, as the Court had earlier held that "parties who choose to resolve litigation through settlement may not . . . impose duties or obligations on a third party without that party's agreement . . . [a]nd, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Local No. 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, 478 U.S. at 529. Thus, this Court has consistently held that parties to a consent decree cannot bind or impose affirmative obligations on persons who are strangers to the proceedings, even if the strangers may have actual knowledge of the lawsuit or the settlement. *Local No. 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, 478 U.S. at 529; *Martin v. Wilks*, 490 U.S. at 761-62.

It is only common sense that there must be *consent* before there can be a consent decree. If there is no consent, a federal court cannot enter the decree, let alone join unrelated parties to the lawsuit and bind them to such a decree. *Martin v. Wilks*, 490 U.S. at 772 (Stevens, J., dissenting) ("it follows as a matter of course that [individuals not parties to decrees] are not bound by those decrees"); *See also Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 589 n.3 (1984) (O'Connor, S., concurring) ("if innocent employees are to be required to make any sacrifices in the final consent decree, they must be represented and have had full participation rights in the negotiation process").

The Court of Appeals' approach, on the other hand, eviscerates *Martin v. Wilks*, *Local 93* and the concept of a *consent* decree. The Court of Appeals decision permits the original parties to the lawsuit to impose affirmative obligations on innocent third parties, even two decades after the decree was entered, as long as the obligations are "prospective." Such an approach is the antithesis of a consent decree. *Local No. 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, 478 U.S. at 529 ("[a]nd, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree"); *See also C. Martin Lawyer, III v. Department of Justice, et al.*, 521 U.S. 567, 579 (1997) (". . . a settlement agreement subject to court approval in a nonclass action may not impose duties or obligations on an unconsenting party . . .").[2]

2. The potential for abuse and mischief in the context of a consent decree is demonstrated by this case. Here, the EEOC agreed with Local 120 (a union facing substantial financial liabilities) that the EEOC would have unrestricted access to employment records (Cont'd)

The courts below honored in the breach the basic due process rights of Honeywell and Johnson Controls — rights recognized by *Martin v. Wilks* and *Local No. 93* — when those courts held that Honeywell and Johnson Controls received due process when they opposed class certification and joinder, Pet. App. A at 19a. Honeywell and Johnson Controls have never argued that they did not receive due process on the "joinder" issue; rather, they assert that their right to due process was violated when they were ordered to undertake affirmative obligations contained in a Consent Decree to which they never consented. This Court has banned such a result. *See Martin v. Wilks*, 490 U.S. at 761-62; *Local No. 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, 478 U.S. at 529.

Moreover, *Martin v. Wilks* and *Local No. 93* do not distinguish between present, retroactive, or prospective enforcement of consent decrees requiring affirmative conduct. The timing of the enforcement of the obligations in a consent decree upon a non-consenting party is simply irrelevant. It would have been a clear violation of due process for the District Court to have ordered Honeywell or Johnson Controls to comply with the Consent Decree in 1972. Surely, the lapse of 20 years did not thereafter vest the District Court with the power to enforce the terms of the Consent Decree against them as non-consenting parties in 1992. Because

---

(Cont'd)
of Honeywell and Johnson Controls. In other words, the EEOC and Local 120 agreed to waive Honeywells' and Johnson Controls' Fourth Amendment rights against unreasonable search and seizure. Such a waiver is impermissible. *Cf. EEOC v. Shell Oil Co.*, 466 U.S. 54, 65 (1984) ("the existence of a [timely] charge [of discrimination] is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC").

Honeywell and Johnson Controls did not consent to the Consent Decree in 1972 and have not consented since, the holdings below cannot, under this Court's relevant decisions, be allowed to stand.

Implicit in both the holding of the District Court and the Court of Appeals is the premise they can bind Honeywell and Johnson Controls to the terms of the Consent Decree because the need to eradicate Local 120's unlawful discrimination outweighs the due process rights of Honeywell and Johnson Controls. Neither *Martin v. Wilks* nor *Local No. 93*, however, permit such an exception to the basic rule that in the absence of a judgment the federal courts cannot bind non-consenting third parties to a consent decree which imposes affirmative obligations on them. While the lower courts' efforts to eradicate discrimination are commendable, such a goal cannot be accomplished at the expense of the rights of Honeywell and Johnson Controls.

In short, the Court of Appeals decision is an important federal decision in conflict with this Court's decisions in *Martin v. Wilks* and *Local No. 93*. If permitted to stand, the EEOC will have the unfettered right literally hundreds of times per year to bind innocent third parties (with no judgment against them) to undertake affirmative acts contained in consent decrees to which they have not consented.[3] Under this approach, *Martin v. Wilks* and *Local No. 93* will have virtually no effect and, in reality, will no longer be the law of the land. This petition should be granted.

---

3. In the past five years, the EEOC has entered into 821 consent decrees in the federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted, or in the alternative, the decision of the Court of Appeals vacated with directions to dismiss Honeywell Inc. and Johnson Controls, Inc. from this matter.

Respectfully submitted,

DOUGLAS A. DARCH
Counsel of Record
WILLIAM F. DUGAN
SEYFARTH SHAW
Attorneys for Petitioners
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED, DECIDED AND FILED DECEMBER 15, 2000

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 98-3935/3986/3987/3988

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant (98-3986),

GEORGE D. EDWARDS; KENNETH JACKSON; MELVIN L. SEALEY; ALVIN WOODFORD; VERA HAMILTON; CHARLES YOUNG; DAVID STEWART; HARLAND JONES; ROBIN HARDWICK; MONTY RATES; RUDOLPH GILLEN; JAMES GARNER, and all others similarly situated,

Intervening Plaintiffs-Appellants (98-3935),

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL NO. 120, et al.,

Defendants-Appellees.

Appendix A

Nos. 98-3987/98-3988

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

GEORGE D. EDWARDS, et al.,

Plaintiffs,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING & PIPEFITTERS INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL NO. 120, et al.,

Defendants,

HONEYWELL, INC. (98-3987);
JOHNSON CONTROLS, INC. (98-3988),

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 68-00473 — James S. Gwin, District Judge.

Argued: August 8, 2000

Decided and Filed: December 15, 2000

Before KEITH, SILER, and BATCHELDER,
Circuit Judges.

* * *

Appendix A

SILER, J., delivered the opinion of the court, in which BATCHELDER, J., joined. KEITH (pp. 18-20), delivered a separate opinion concurring in the judgment.

OPINION

SILER, Circuit Judge. Plaintiffs-Intervenors George Edwards, et al. ("Intervenors"), appeal the denial of their request for individual relief against Defendants United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 120, et al. ("Union"), for violations of a consent decree's prohibition against employment discrimination. Plaintiff Equal Employment Opportunity Commission ("EEOC"), appeals the same ruling by the district court, insisting the ruling did not alter the court's prior finding that the Union had violated certain record- keeping and reporting requirements of the consent decree. Defendants Honeywell, Inc. and Johnson Controls, Inc. ("Honeywell and Johnson") appeal the order joining them as defendants to Intervenors' action and thereby subjecting them to the provisions of the consent decree. We AFFIRM and REMAND.

BACKGROUND

This consolidated appeal primarily involves two actions which alleged violations of a consent decree to which the Union was a party. The Union represents pipefitters in the construction industry and is a signatory to various collective bargaining agreements with the Mechanical Contractors Association. Under these agreements, the Union is the exclusive referral source for pipefitters to members of the

Mechanical Contractors Association in the area surrounding Cleveland, Ohio. Because construction work is intermittent, contractors frequently supplement their workforce with referrals from the Union.

In 1968, the EEOC filed a complaint against the Union alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* In January 1972, the district court entered a consent decree containing various provisions prohibiting the Union from "in any way limiting, segregating or classifying or otherwise adversely affecting [a journeyman's or pipefitter's] status as an employee or as an applicant for employment because of such individual's race or national origin." Intervenors, a certified class of black union members of the Union since January 1972, allege that this provision has been violated because white union members are routinely referred for work at higher rates and for longer durations than are black union members.

The consent decree also imposed various record-keeping and reporting requirements upon the Union. The Union was required to maintain out-of-work lists and to generally refer members for work in the order in which they registered. The major exceptions to this rule were that the Union was required to allow employers to recall former workers within certain time periods and to respond to requests for union members with specialized skills. Also included in the decree was the obligation that the Union provide and maintain a "master registration card" for each person seeking an employment referral. The master registration card was to note the date of referral, the name of the employer to whom the employee was referred, and the classification of the referral.

Additionally, the Union was to provide a summary report at the end of each calendar quarter concerning these referral records.

In 1990, the EEOC sought an order requiring the Union to show cause why it should not be held in contempt for violating the record-keeping and reporting requirements of the consent decree. In 1992, the district court issued various orders holding the Union in civil contempt based upon, among other things, its failure to maintain a referral register and failure to maintain master registration cards. The district court ordered the Union to improve its record-keeping practices and to maintain in machine-readable form its members' out-of-work registrations and referrals on an individualized basis. Additionally, the district court found that the Union had engaged in a pattern or practice of discrimination in the operation of its work referral system that resulted in black union members receiving fewer overall work hours than white members. The district court declined to award specific compensatory damages because the nature and content of the evidence would not allow for any particular black union member to show that he was given a referral of a shorter duration than a white union member. However, the district court did order that the Union pay a coercive fine of $200,000. Of this $200,000 total, $100,000 would be reserved to pay individual damages and the balance would be distributed among the 106 black class members.

Additionally, the district court ordered that any class member who contended that he was intentionally passed over due to discrimination in the referral practice had to first file a written grievance with a joint hiring committee. Upon

denial of that complaint, the class member could obtain de novo review in the district court. No class members filed any such grievance.

In October 1992, pursuant to Fed. R. Civ. P. 19(a) and 21, the district court ordered the joinder as defendants the contractors that utilized the Union's hiring hall to secure compliance with the consent decree's record-keeping and recording requirements. Honeywell and Johnson were among the contractors joined as defendants. The district court denied Honeywell's and Johnson's joint motion to dismiss on December 17, 1992.

These interlocutory orders became final upon the district court's entry of an opinion and final judgment dated December 22, 1992, in which the district court reaffirmed its prior rulings. Intervenors moved under Fed. R. Civ. P. 59(e) to amend the district court's order and for the award of individual relief. The district court granted this motion, holding that an additional, or "Stage II," hearing was to be held to determine what, if any, individual relief should have been awarded to Intervenors. The district court also stated that the Union had the burden of proof at the Stage II hearing and that the court would thereafter issue a final determination as to whether any of the prior rulings of the district court would require modification.

In preparation for the Stage II hearing, Judge William K. Thomas supervised the depositions of the various expert witnesses. One witness was Dr. Rebecca Klemm, a court-appointed expert who was charged with assessing the Union's record-keeping and creating a database to evaluate the

EEOC's and Intervenors' claims. Following the completion of these depositions, Judge Thomas retired and the case was reassigned to Judge James S. Gwin. After trial, the district court held that Intervenors had not shown that they were entitled to further individual relief. Judge Gwin also reexamined Judge Thomas's finding that the Union had engaged in a pattern or practice of discrimination and held that finding was clearly erroneous based upon statistical methodology that was incorrect and that failed to account for various exceptions to the requirements of the consent decree. The district court's order did not address the prior finding that the Union had violated the record-keeping and reporting requirements of the consent decree.

DISCUSSION

I. LAW OF THE CASE

In its opinion following the Stage II hearing, the district court relied upon the law of the case doctrine in its reexamination of the prior finding of a pattern or practice of discrimination. "The purpose of this doctrine is twofold: (1) to prevent the continued litigation of settled issues; and (2) to assure compliance by inferior courts with the decisions of superior courts." *United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990). "[L]aw of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); *see also Moses v. Business Card Express, Inc.*, 929 F.2d 1131 (6th Cir. 1991) (quoting *Arizona* for this

proposition). "Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Arizona*, 460 U.S. at 619 n.8. "Law of the case directs a court's discretion, it does not limit the tribunal's power." *Id.* at 618.

" 'Issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case.' " *Hanover Ins. Co. v. American Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997) (*quoting Coal Resources, Inc. v. Gulf & Western Ind.*, 865 F.2d 761, 766, opinion amended on denial of reh'g, 877 F.2d 5 (6th Cir. 1989)). "As we have held, however, this 'law of the case' doctrine is 'directed to a court's common sense' and is not an 'inexorable command.' We have stated three reasons to reconsider a ruling . . . [including] where a decision is clearly erroneous and would work a manifest injustice." *Id.* (*quoting Petition of U.S. Steel Corp.*, 479 F.2d 489, 493 (6th Cir. 1973)). "It is within the sole discretion of a court to determine if a prior ruling should be reconsidered. Thus, we decline to impose any conditions or limitations upon a court's power to review a prior ruling of [its own or of][1] another court." *Todd*, 920 F.2d at 403. Thus, the propriety of the court's reconsideration of its prior finding will be reviewed for abuse of discretion.

Intervenors argue that the district court abused its discretion by exceeding the scope of the grounds upon which

1. "[The law of the case] doctrine applies with equal vigor to the decisions of a coordinate court in the same case and to a court's own decisions." *Todd*, 920 F.2d at 403.

the Rule 59(e) motion was brought. That motion sought a hearing, that became the Stage II hearing, on the question of whether individual relief could be awarded to the class members. Thus, Intervenors argue that it was an abuse of discretion to reconsider the prior finding of a pattern or practice of discrimination.

There are two fatal flaws in this argument. First, Intervenors cite to no authority in support of the proposition that the only portions of a judgment subject to either being reviewed or amended pursuant to a Rule 59(e) motion are those grounds upon which the motion is founded. Rather, "[a] judge may enlarge the issues to be considered in acting on a timely motion under Rule 59." *Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986). The second major flaw in this argument is that Judge Thomas had previously notified the parties that his earlier finding of a pattern or practice of discrimination was subject to revision following the Stage II hearing:

> [D]efendant Local 120 has the burden of proof at the Stage II hearing. However, whether Local 120 has carried its burden in the damages hearing will not be affected by this Court's finding [that the Union had not rebutted the prima facie discrimination].
>
> * * *
>
> Depending on the state of the record as augmented by the forthcoming hearing, this Court will finally determine, pursuant to Rule 59(e), (1) whether any

> of the above referenced rulings of the court in Memorandum and Order II [including the finding of a pattern or practice of disparate treatment in the work referral system] would require modification; and, (2) whether or not the evidence and the Court's authority under Rule 59(e) would warrant affirming its [prior] conclusion . . . that "specific loss of pay could not be proved by the particular black pipefitter, and he or she could not be awarded specific compensatory damages."

In the quoted language, the district court distinguished between allowing an independent reexamination of whether the Union could rebut the Intervenors' prima facie case of discrimination and allowing the presentation of the same rebuttal evidence in the hearing on individual relief. Thus, Intervenors' argument that Judge Thomas prohibited the introduction of evidence that would rebut his earlier practice and pattern finding in later orders is only partially correct. The district court relied on rebuttal evidence during its reexamination of its finding of a pattern or practice of discrimination. Judge Thomas had prohibited this rebuttal evidence in his March 31, 1993 and October 3, 1997 Orders, but only in the context of attacking individual claims. Judge Thomas stated that the finding of a pattern or practice of discrimination could be revisited outside of this context. Intervenors cite to no authority indicating that the district court erred by doing so.

Intervenors argue that when the district court revisited and abrogated its pattern or practice finding, it "abused its discretion by making clearly erroneous findings." The district

court based its abrogation on two main factors. First, it found that "the methodology used to approximate out-of-work periods is extremely inaccurate." These inaccuracies were based upon several examples in which the data contradicted the conclusions of Intervenors' expert. Second, the district court found that the methodology used by Intervenors to determine hours allegedly lost due to discrimination to be faulty. According to the district court, the methodology failed to account for recalls and for requests for specialized skills, which were allowed under the consent decree. A decision "is clearly erroneous and would work a manifest injustice," if the data relied upon to make that decision ignores or fails to account for the circumstances the data is supposed to reflect. *Arizona*, 460 U.S. at 619. The data in this case cannot show that the Union's referral practice was inconsistent with the consent decree because the collection of the data did not track the terms of the decree. Thus, the decision of the district court to reverse its earlier finding with regard to a pattern or practice of discrimination on the part of the Union was not an abuse of discretion.

II. INDIVIDUAL CLAIMS

Intervenors argue that the district court erred by not affording each plaintiff a presumption of discrimination based upon the earlier ruling that the Union engaged in a pattern or practice of discrimination. They correctly point out that the district court properly recognized this presumption after it found class-wide disparate treatment. Following such a finding, a remedy phase is conducted during which each class member is presumed to have been discriminated against and the burden shifts to the defendant

to rebut that presumption in each individual case. "[I]n so-called 'pattern or practice cases,' if the plaintiff can establish 'that racial discrimination was the company's standard operating procedure,' the burden of proof shifts to the defendant to show that in individual cases the hiring decision was not due to the discriminatory policy but to some other, legitimate consideration." *Lujan v. Franklin County Bd. of Educ.*, 766 F.2d 917, 928-29 (6th Cir. 1985) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 (1977)) (citation omitted). As the district court's opinion describing the procedure to be employed at the Stage II hearing shows, this burden-shifting approach was properly recognized by the district court.

The district court's reversal of its prior finding of a pattern or practice of discrimination extinguished any presumption the Intervenors were entitled to at the Stage II hearing. After the district court reversed its pattern or practice finding, it was not required to pass upon the damages claim and was no longer bound by Judge Thomas's previous limitations on pattern and practice rebuttal evidence in the individual damages hearing. The district court did pass on that claim, however, finding that "even if Plaintiff-Intervenors' methodology were sufficiently accurate, which it is not, Local Union 120 has rebutted Plaintiff Intervenors' request for additional relief." This finding was based on a lack of direct evidence of discrimination and circumstantial evidence "that black pipefitters were referred at numbers higher relative to their numbers than white pipefitters."

Because the district court did not err by reexamining and reversing its earlier finding of a pattern or practice of

discrimination, the question of whether it properly applied the burden-shifting approach is moot. Because the finding that the Union did not engage in a pattern or practice of discrimination was not an abuse of discretion, it is unnecessary to determine whether Intervenors are entitled to individual relief. Even if the district court erred in concluding that the Union had rebutted Intervenors' claims for individual relief, such error would not be reversible because its conclusion that there was no pattern or practice of discrimination would dispose of the matter entirely.

III. EVIDENTIARY RULINGS

Intervenors argue that the district court erred by admitting into evidence several volumes of previously undisclosed expert reports, exhibits, and business records. They argue that admitting this evidence was prejudicial due to its sheer volume and their reliance upon the reports produced during discovery, which they allege to be materially different from those at issue. Additionally, they argue that the evidence at issue is prejudicial because it was not produced prior to the depositions of the various experts in violation of a court order to do so. "Generally, a trial court's evidentiary determinations are reviewed for an abuse of discretion." *United States v. Smithers*, 212 F.3d 306, 310 (6th Cir. 2000).

This court has held that without a fair opportunity to attack the credibility of a report that was not disclosed during discovery, a new trial was warranted on the basis of the report's having been admitted. *See Dorsey v. City of Detroit*, 858 F.2d 338, 343-44 (6th Cir. 1988). Crucial to the court's

determination was that the author of the report was unavailable for cross-examination after having moved out of the court's jurisdiction. *See id.* at 343.

The Union responds by arguing that its experts did not present any new opinions at the Stage II hearing but merely prepared and presented summaries of their previously disclosed reports. Each of the experts stated that all of the material in the various exhibits and reports had been addressed in earlier expert reports or in the depositions of the experts. As there was no objection to that testimony, it is difficult to see how the admission of such evidence could amount to an abuse of discretion.

The Union also argues that due to the various delays in the production of Intervenors' expert report, it was properly granted the right to submit a supplemental report. Intervenors agree that this right was granted to the Union, but they argue that it was abused because the disclosed information was not "supplemental." However, the testimony of the experts that the evidence contained nothing new is dispositive of Intervenors' argument.

Intervenors argue that the district court failed to properly exercise its gatekeeping role under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), as applied to all forms of expert testimony in *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999), by allowing the introduction of evidence that was both irrelevant and of insufficient reliability. The Union responds that its expert evidence was clearly relevant to the issue of whether Intervenors were entitled to individual relief.

Appendix A

The examples of allegedly irrelevant evidence that Intervenors assert, specifically the expert evidence concerning what hours measurement to employ in evaluating claims for individual relief, meets the standard of relevance. Additionally, Intervenors fail to present a discernable argument as to why this expert evidence does not meet the reliability requirements of *Daubert* and *Kumho.* Thus, no error occurred with respect to this issue.

IV. RULE 63

Intervenors argue that Judge Gwin failed to comply with the requirements of Fed. R. Civ. P. 63 upon receiving the case following Judge Thomas's retirement. "If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties." Fed. R. Civ. P. 63. Intervenors allege that Judge Gwin was not familiar with the record and failed to make the required certification. The Union responds that at various times during the Stage II hearing, Judge Gwin indicated his extensive familiarity with the record.

Intervenors rely upon *Semaan v. Allied Supermarkets, Inc.*, 774 F.2d 1164, 1985 WL 13677 (6th Cir. Sept. 25, 1985) (unpublished), for the proposition that a successor judge may not reopen a judgment of liability in a damages hearing if any issues of credibility are involved. *Semaan* is inapplicable because it involved a motion for a new trial rather than the issue of reexamining a prior finding of a court.

Intervenors also cite to *Semaan* for its discussion of *Berry v. School District of the City of Benton Harbor*, 494 F.Supp. 118 (W.D. Mich. 1980). The *Semaan* court discussed *Benton* approvingly, stating that:

> The [*Benton*] court held that a motion for a new trial under Rule 63 is a matter of discretion but that the court "may not properly overrule the decision of the first judge in the absence of special circumstances." A difference of opinion regarding credibility and the weight of the evidence does not constitute exceptional circumstances.

Semaan, 1985 WL 13677, at *2. Although the rationale that a successor judge should respect the credibility determinations of his predecessor is valid, Intervenors' argument on this issue must fail as no new trial motion was ever at issue and, as stated above, the issue of the propriety of reexamining the finding of a pattern or practice of discrimination is governed by the law of the case doctrine.

V. CONTEMPT

The EEOC argues that, despite the district court's reversal of its finding of a pattern or practice of discrimination, it is still the prevailing party with respect to the issue of whether the Union had violated the record-keeping and reporting requirements of the consent decree. The Union responds that the final order of June 25, 1998, from which all of these appeals arises, vitiates all prior orders of the district court because those orders relied upon the statistical analysis of the court-appointed expert, and the court found that analysis to be unreliable in its June 25, 1998 order.

The district court has not had an opportunity to specifically address this issue. Accordingly, we remand this issue for consideration before the district court, when it decides the pending issues of attorney fees and costs.

VI. JOINDER OF HONEYWELL AND JOHNSON

In an order dated October 29, 1992, the district court denied the EEOC's motion to certify a class of defendants pursuant to Fed. R. Civ. P. 23(b)(2), yet treated the motion as one for the joinder of unwilling party defendants under Rules 19(a) and 21. Based upon the following paragraphs in the consent decree, the court ordered Honeywell and Johnson, among many other contractors, to be joined as defendants:

> Requests for referral of employees through the Union shall be made in writing specifying the number of journeymen and journeymen-trainees required; provided, that a request for referral of employees may be made orally by an employer subject to later confirmation in writing as above provided within not more than three business days thereafter.
>
> . . .
>
> [E]ach contractor employing members of the Union shall file with the Court and serve upon all counsel a copy of the form presently in use for reporting contributions to the fringe benefit funds for such calendar month, setting forth the name, social security number, race, classification as a

> journeyman or journeyman-trainee or apprentice, status as a member or traveler or permit man, rate of pay and the number of regular hours, overtime hours and total hours worked by each person employed as a pipe fitter subject to the jurisdiction of the Union.

The district court found that the joinder of each contractor under Fed. R. Civ. P. 19(a) was required to secure compliance with these provisions, to avoid the imposition of inconsistent obligations upon the parties, and to ensure that complete relief could be granted prospectively to the EEOC and Intervenors.

Honeywell and Johnson argue that subjecting them to the consent decree, to which they did not consent, without notice or an opportunity to be heard constitutes a due process violation. In so arguing they rely upon *Martin v. Wilks*, 490 U.S. 755 (1989),[2] in which the Court held that precluding a party from challenging a consent decree to which it was not a party "contravenes the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." *Id.* at 759. Honeywell and Johnson argue that

---

2. "It should be noted that portions of the Supreme Court's decision in *Martin v. Wilks* have been superseded by statute — Section 108 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n)(1), which became effective on November 21, 1991. However, we agree with the court in *Maitland v. University of Minnesota*, 43 F.3d 357 (8th Cir. 1994) that section 108 is not to be applied retroactively, and, therefore, we do not consider it in regard to the present case." *Rafferty v. City of Youngstown*, 54 F.3d 278, 281 (6th Cir. 1995).

subjecting them to the provisions of the consent decree falls squarely within this rule. Additionally, they cite to *Local 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501 (1986), for the propositions that:

> parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement. . . . And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.

Id. at 529.

The district court joined these defendant contractors to ensure complete relief on a prospective basis regarding the record-keeping and reporting requirements of the consent decree. The joinder of Honeywell and Johnson was not violative of procedural due process. Their joinder did not subject them to liability for past conduct. They are not being deprived of legal rights by a retroactive application of the terms of the consent decree. The impact of joining Honeywell and Johnson is *de minimus* and prospective. The district court joined these defendants to enforce the decree against the Union, not for the binding effect it would have on Honeywell and Johnson. Honeywell and Johnson were given notice and an opportunity to defend their positions when the EEOC moved to designate a class of defendant contractors that had utilized the Union's hiring hall. All of these facts distinguish this case from those relied upon by Honeywell and Johnson.

Appendix A

The joinder of Honeywell and Johnson under Fed. R. Civ. P. 19(a) was not an abuse of discretion by the district court. Numerous contractors that utilized the Union's hiring hall were not parties to the original consent decree. Thus, the Union's compliance with the decree, especially in light of the individual claims and lax reporting and record-keeping, was impossible to gauge when non-party contractors hired union workers. This consideration and the need to modify the decree as a result of the Union's alleged contempt justify the district court's concern that "complete relief" could not be attained without joining Honeywell and Johnson. Fed. R. Civ. P. 19(a).

AFFIRMED IN PART AND REMANDED IN PART.

Appendix A

CONCURRENCE

KEITH, Circuit Judge, concurring. Although I agree that the district court's opinion should be affirmed, I write separately to note my disagreement with the application of the law-of-the-case doctrine to reach this result.

The law-of-the-case doctrine "expresses the practice of the courts generally to refuse to reopen what has been decided." *Christansson, et al. v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)). This Court has particularly recognized the import of this doctrine when a case is transferred from one judge to another "inasmuch as '[t]he utility of such a transfer would be seriously compromised if the fact of a transfer were to be treated as an invitation to seek a second opinion on every pre-transfer ruling. . . .' " *Gillig v. Advanced Cardiovascular Systems, Inc.*, 67 F.3d 586, 590 (6th Cir. 1995) (quoting 1b JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 0.404[4.-2] (2d ed. 1994)). *See also Christansson*, 486 U.S. at 816 ("[T]ransferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation."). Accordingly, coordinate courts are instructed "to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983). To deem otherwise would undermine the strength of final determinations and would foster an air of paternalism. Under this construct, it is difficult to conceive how Judge Thomas's twenty year relationship[1] with

1. District Court Judge William K. Thomas entered the consent decree. Prior to the additional Rule 59 hearings, Judge Thomas, who had presided since 1972, retired. The case was transferred to Judge James S. Gwin.

the details of this case, coupled with his interpretation of an inordinate amount of testimonial and statistical evidence, could be overturned as clearly erroneous. Indeed, the Supreme Court has held that

> [I]f the district court's account of the evidence is plausible in light of the record *viewed in its entirety*, the court of appeals [and coordinate courts] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. . . . This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical documentary evidence or inferences from other facts.

Anderson v. Bessemer City, 470 U.S. 564, 573-574 (1985) (emphasis added) (citations omitted). *See also Owens-Illinois, Inc. v. Aetna Casualty & Surety Company*, 990 F.2d 865, 870 (6th Cir. 1993).

The instant matter, however, is factually distinct from the extraordinary circumstances that are normally required to overturn a court's evidentiary findings. District Court Judge Thomas granted the Plaintiff-Intervenors' motion to "alter or amend" the judgment. It is long-settled that when a final judgment is reopened the judgment remains subject to the control of the court until the motion is disposed of and, until that time, does not become final. *See generally,*

e.g., Fed. R. App. Pro. 4(a)(4) (discussing the effect of a motion to alter or amend on a final order of judgment). *See also Kingman & Co. v. Western Mfg. Co.*, 170 U.S. 675 (1898). Moreover, once the judgment is reopened "[a] judge may enlarge the issues to be considered in acting under Rule 59." *Charles v. Daly*, 799 F.2d 343, 347 (7th Cir. 1986). In this matter, as noted by the majority, Judge Thomas notified the "parties that his earlier finding of a pattern or practice of discrimination was subject to revision following the Stage II hearing." Consequently, Judge Thomas "put the parties on notice" that the issue of pattern or practice could be revisited and, yet, the parties failed to object to this broadened inquiry for the Stage II hearing.[2] Accordingly, Judge Gwin was entitled to revisit, amend or alter the earlier determinations and his subsequent ruling did not trigger law-of-the-case consequences.

Accordingly, for the above stated reasons, I respectfully CONCUR in the judgment rendered by the majority.

---

2. Presumably, Plaintiff-Intervenors did not object to the widened scope of inquiry because they believed that any determinations made in the Stage II hearing would inure to their benefit.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 98-3935; 98-3986

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff – Appellant (98-3986),

GEORGE D. EDWARDS; KENNETH JACKSON; MELVIN L. SEALEY; ALVIN WOODFORD; VERA HAMILTON; CHARLES YOUNG; DAVID STEWART; HARLAND JONES; ROBIN HARDWICK; MONTY RATES; RUDOLPH GILLEN; JAMES GARNER, and all others similarly situated,

Intervening Plaintiffs – Appellants (98-3935),

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL NO. 120, et al.,

Defendants – Appellees.

Before: KEITH, SILER, and BATCHELDER, Circuit Judges.

Appendix A

JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Akron.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART and REMANDED IN PART.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED AND FILED JUNE 25, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C68-473

Judge James S. Gwin

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

GEORGE EDWARDS, et al.,

Plaintiff-Interveners,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY, LOCAL 120, et al.,

Defendants.

OPINION AND ORDER

Appendix B

In this employment discrimination case involving claims that a plumbers' union discriminated against black pipe fitters in job referrals, the Court decides whether the Court should give additional relief to class members. The Court decides whether Plaintiff EEOC and Plaintiff-Interveners show evidence that from 1978 to 1992, Defendant Local Union 120 discriminated in job referrals based on race.

On January 29, 1972, this Court entered a consent decree in this case. In that decree, the United States Department of Justice and the United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local No. 120 ("Local Union 120") agreed to union job referral procedures. The case is again before the Court to assess damages resulting from Local Union 120's claimed noncompliance with the consent decree.

In deciding Plaintiffs' motion for contempt, the Court first reviews the procedural posture of this case. Second, the Court examines whether this Court should exercise discretion to reexamine earlier findings when strong evidence suggests that earlier Court findings were mistaken. Third, the Court reviews the parties' burdens of coming forward with evidence proving or disproving discrimination in Local Union 120's referral system. Finally, the Court discusses what evidence of damage exists in the record before this Court.

For the reasons that follow, the Court denies Plaintiff-Interveners' request additional relief.

Appendix B

I. Procedural background

In this case, Plaintiff-Interveners say Defendant Local Union 120 pursued racially discriminatory policies and failed or refused to refer black union members for employment on the same basis as the Union referred white union members. Plaintiff-Interveners say Local Union 120 did this by passing over black members on an out-of-work list.

Local Union 120 is a craft union that represents pipe fitters in the construction industry. It is a signatory to collective bargaining agreements with the Mechanical Contractors Association. Under these agreements, Local 120 is the exclusive referral source for pipe fitters to members of the Contractors Association in the Cleveland area. These employers variously provide HVAC, sprinkler, welding and atomic power construction services.

Because construction work is intermittent, employers frequently supplement their work force with referrals from Local Union 120. In this 1968 litigation, the Plaintiff EEOC claimed Defendant Local Union 120 discriminated based upon race in making these referrals.

As indicated, Defendant Local Union 120 and the Plaintiff EEOC reached agreement over a consent decree. Under this January 20, 1972, consent decree, Local Union 120 was required to maintain out-of-work lists and to generally refer members for work in the order in which they registered for work on the list. As major exceptions to this rule, Local Union 120 was required to allow employers to recall former workers within certain time periods. As further

exceptions to the first registered rule, Local Union 120 was required to respond to requests for union members with specialized skills.

On March 29, 1990, the Plaintiff EEOC sought an order requiring Defendant Local Union 120 to show cause why it should not be held in contempt for violating the consent decree. In its motion, the EEOC said the union had failed to maintain master registration cards, had failed to maintain registration lists and had failed to make referrals as required by the January 20, 1972, consent decree.

On September 1, 1992, this Court issued various Orders in this case.[1] In those, the Court found that Defendant Local Union 120 did not maintain a referral register and in 1979 stopped maintaining master registration cards. This Court found Local Union 120 did so without court approval.[2] While finding that Local Union 120 failed to comply with record keeping requirements of the consent decree, this Court found that no adverse inference may be drawn from its failure to maintain or produce records for these proceedings. The Court refused certain Local Union 120 defenses and denied dismissal of the Mechanical Contractors Association.

The Court found Local Union 120 in civil contempt. First, this Court found that Local 120 Business Agents could

---

1. At the time these orders were issued, then Senior Judge Thomas presided over the case.

2. Paragraph 4(c) of the consent decree required Defendant Local Union 120 to make note on each employee's master registration card. The union was required to identify the date of referral, the name of the employer, and the classification of referral.

generally predict how long an upcoming job was likely to last. Judge Thomas further found a pattern or practice of discrimination by the union in the operation of its work referral system.[3] As a result, Judge Thomas found that black union members received fewer overall work hours than white members.[4]

As a remedy, Judge Thomas directed that Local Union 120 improve record keeping.[5] To remedy individual discrimination, he also ordered that any class member who contends s/he was intentionally "passed over" shall first file a written grievance with the joint hiring committee. If the committee denies the grievance, the complaining class member could file request for review with the Magistrate Judge of this Court. If the black pipe fitter filed such a request for review, the Magistrate Judge would make a *de novo* review.

---

3. Judge Thomas however found that black pipe fitters, sometimes received referrals ahead of whites because contractors, operating under government contracts, requested black pipe fitters.

4. Judge Thomas found that from 1972 to 1978, black union members received substantially equivalent work hours as whites. He found that from 1979 to 1984, 1985 to 1987, and 1988 to 1990, black union members received substantially less work hours than whites.

5. Judge Thomas ordered revised computerized record keeping. He ordered that written documentation follow employer requests for specific employees. He approved a hiring hall rule saying that employees needed 320 hours, not 80 hours of employment, before they were required to go to the end of the referral list.

Appendix B

Since the time Judge Thomas ordered this grievance procedure be set up in September 1992, no class members filed a grievances with Local 120 claiming that he/she was "passed over" by a work referral given to a white pipe fitter.

Judge Thomas further ordered a coercive fine of $200,000 against Local 120. Of this, $100,000 would be reserved to pay damages ordered under the provision for individual claims described above. Judge Thomas fashioned an algorithm to distribute the other $100,000 among the 106 black class members.

Finally, Judge Thomas ordered the apprenticeship program indenture one black pipe fitter for each white pipe fitter indentured.

In his contempt order, Judge Thomas found that the totality of the evidence presented in the contempt proceedings:

> . . . establishes a pattern or practice of disparate treatment as to Black pipefitters on the part of Local 120 in the operation of its work referral system . . . nor does the entire record rebut, Plaintiff-Interveners' prima face [sic] case of disparate treatment . . .
>
> * * *
>
> But the nature and content of the evidence in the record would not enable any particular black pipefitter to show that one or more business

> representatives, in making referrals of shorter likely duration than particular pipefitters received. Hence specific loss of pay could not be proved by the particular pipefitter and he or she therefore could not be awarded specific compensatory damages.

The Court also found "loss of pay cannot be awarded to individual members of the class."

Plaintiff-Interveners moved this Court to amend its December 22, 1992, final order and judgment. On February 2, 1993, this Court granted Plaintiff-Interveners' motion to amend the final judgment. In granting Plaintiff-Interveners' motion to amend the December 22, 1992, order, this Court ruled:

> This Court determines that an additional (second stage) hearing will be held to determine what, if any, "individual relief" should be awarded. . . . Hence, this Court questions whether the present state of the record would warrant the application herein of the *Teamsters* holding.

In his February 2, 1993, memorandum order, Judge Thomas stated that his earlier findings as to a pattern and practice of discrimination were subject to revision after this Court's Stage II hearing:

> [D]efendant Local 120 has the burden of proof at the Stage II hearing. However, whether Local 120 has carried its burden in the damages hearing will

> not be affected by this Court's finding [the earlier finding that the Local Union 120 had not rebutted Plaintiff's case of prima faca [sic] discrimination.]
>
> * * *
>
> Depending on the state of the record as augmented by the forthcoming hearing, this Court will finally determine, pursuant to Rule 59(e), (1) whether any of the above referenced rulings of the court in Memorandum and Order II would require modification; and, (2) whether or not the evidence and the Court's authority under Rule 59(e) would warrant affirming its conclusion in Memorandum and Order II, page 90, that "specific loss of pay could not be proved by black pipefitter, and he or she could not be awarded specific compensatory damages."

Thus, under the February 2, 1993, memorandum order, the Court made certain findings. First, Judge Thomas questioned whether the present state of the record would warrant the application of *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), which would shift the burden to Defendant Local Union 120.[6] Second, Judge Thomas ruled that his earlier finding of a pattern and practice of discrimination was subject to review "depending on the state of the record as augmented by the forthcoming hearing."

---

6. In *Teamsters*, the Supreme Court found that "[t]he proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." 431 U.S. at 362.

Appendix B

The parties tried this case to the Court for eight trial days between April 29, 1998, to May 7, 1998. After reviewing the evidence and observing the demeanor of the witnesses, the Court finds that Plaintiff-Interveners fail to show entitlement to further relief.

II. Standard required to show "pattern and practice" of discrimination.

Plaintiff EEOC and Plaintiff-Interveners suggest this Court is bound by the law-of-the-case to find that Local Union 120 employed a pattern and practice of discrimination. Determination of whether Local Union 120 engaged in a pattern and practice of discrimination is important because such a finding shifts the burden of the production of evidence.

In "pattern or practice cases," the plaintiff must first establish "that racial discrimination was the company's standard operating procedure." *Teamsters*, 431 U.S. at 336; *Wooldridge v. Marlene Indus. Corp.*, 875 F.2d 540, 545 (6th Cir. 1989). If a party shows a pattern and practice of discrimination, "the burden of proof shifts to the defendant to show that in individual cases the hiring decision was not due to the discriminatory policy but to some other, legitimate consideration." *Wooldridge*, 875 F.2d at 545 (citing *Teamsters*, 431 U.S. at 359).

In *Teamsters*, the Supreme Court described the showing required to make out a pattern and practice of discrimination:

> [B]ecause it alleged a systemwide pattern or practice of resistance to the full enjoyment of Title

> VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a preponderance of the evidence that racial discrimination *was the company's standard operating procedure — the regular rather than the unusual practice.*

Teamsters, 431 U.S. at 336 (emphasis added).[7]

---

7. The *Teamsters* Court, quoting legislative leaders, defined a pattern and practice of discrimination as follows:

> Senator Humphrey explained: "[A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, a number of companies or persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute."
>
> * * *
>
> "The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice . . . ." 110 Cong. Rec. 14270 (1964).

This interpretation of "pattern or practice" appears throughout the legislative history of § 707(a), and is consistent with the understanding of the identical words as used in similar federal legislation. *See* 110 Cong. Rec.

(Cont'd)

Appendix B

In *Stotts v. Memphis Fire Dep't*, 858 F.2d 289 (6th Cir. 1988), the Sixth Circuit described the showing required to make out a pattern and practice of discrimination. The Court noted "it is the plaintiff's burden to prove that an employer intentionally 'treats some people less favorably than others because of their race, color, religion, sex, or national origin.' " *Id.* at 294 (citing *Teamsters*, 431 U.S. at 335 n. 15). In *Stotts*, the Court noted that:

> "Proof of illicit motive is essential, but, especially in cases alleging class-wide discrimination, illicit motive may be inferred from a sufficient showing of disparity between members of the plaintiff class and comparable qualified members of the majority group." *Id.* at 295 (quoting *Segar v. Smith*, 738 F.2d at 1265-66 (citation omitted)). The plaintiff's case must, however, eliminate "the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 253-54.
>
> * * *
>
> The plaintiff who alleges a discriminatory pattern or practice, be it through disciplinary measures

---

(Cont'd)

12946 (1964) (remarks of Sen. Magnuson) (referring to § 206(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-5); 110 Cong. Rec. 13081 (1964) (remarks of Sen. Case); *id.*, at 14239 (remarks of Sen. Humphrey); *id.*, at 15895 (remarks of Rep. Celler).

Teamsters, 431 U.S. at 336 n. 16.

or hiring procedures, must ultimately prove "more than a mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. [He must] establish by a preponderance of the evidence that racial discrimination was the Company's standard operating procedure — the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. As Title VII's legislative history points out: "[A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. . . . The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice. . . ." (citations omitted).

* * *

We find the district court's finding of a pattern and practice to be clearly erroneous because it is based upon comparisons of a series of factually unique and qualitatively dissimilar incidents and a corresponding series of appropriately individualized disciplinary actions which have been imposed in complete consistency with racially neutral and nonarbitrary guidelines. In sum, plaintiff Jones has failed to eliminate the most common nondiscriminatory reasons for the differences in the fight-related discipline handed down by the Department: the nature of the offenses and the nature of the punishments

> imposed, particularly in relation to the employees' personnel records. Accordingly, we conclude that Jones' evidence of defendant's fight-related discipline has failed to establish a *prima facie* case of racial discrimination.

Id. at 295-98 (footnotes omitted).

Judge Thomas's suggestion of a pattern and practice of discrimination has significant evidentiary consequences. Plaintiff-Interveners suggest that this Court be bound by the earlier finding. The Court now examines whether the "law of the case" requires this finding.

III. Discussion of the "law of the case."

The "law-of-the-case" doctrine ordinarily directs a court to adhere to prior findings of fact and of law. It is a "rule of judicial comity" designed to promote efficiency, not one of jurisdictional limitation. See *Moses v. Bus. Card Express, Inc.*, 929 F.2d 1131, 1137 (6th Cir.), *cert. denied*, 502 U.S. 821 (1991). That is, the doctrine does not limit a court's power to revisit a previously settled issue of law or of fact, it simply "directs a court's discretion." *Id.* (quoting *Arizona v. California*, 460 U.S. 605, 613 (1983)).

The Sixth Circuit has declined to impose a rigid set of conditions under which a transferee court may review a prior ruling of a coordinate court. See *United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990). Instead, "[i]t is within the sole discretion of a court to determine if a prior ruling should be reconsidered." *Id.* In the Sixth Circuit, a district court's

reconsideration of a previously decided issue "will be deemed erroneous only if it is shown that the transferee court abused its discretion." *Id.* District courts are generally afforded even broader discretion to revisit prior evidentiary issues because "this type of decision turns upon the evidence as developed during the course of a trial." *Id.* Thus in *Todd*, the Sixth Circuit upheld a district court's introduction of evidence that established the defendant's involvement in money laundering when that evidence had been excluded from a first trial. See *id.* at 404.

Under the law-of-the-case doctrine "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." *Arizona,* 460 U.S. at 618 n. 8. A finding of fact is clearly erroneous when, although there may be some evidence to support the finding, "the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 341 (6th Cir. 1997) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75 (1985)). The "clearly erroneous" standard does not allow an appellate court to modify a trial court's findings simply because, had it been sitting as the trier of fact, it would have found differently. See *Anderson*, 470 U.S. at 573-75. However, a reviewing coordinate court has the power to review prior findings under any circumstances. See *Todd*, 920 F.2d at 403.

This Court finds scant reason to defer to the earlier finding of a pattern and practice of discrimination. First, the September 1, 1992, order was not a final judgment. Plaintiff-Interveners themselves, admitted as much when they moved

for amendment of the earlier order, even if on other grounds. Second, in his February 2, 1993, Order, Judge Thomas explicitly stated that his earlier finding would be subject to review on the evidence presented at the stage II hearing. Third, the evidence presented at the stage II hearing shows that adherence to this Court's earlier order would be clearly erroneous and would work an injustice.

The law-of-the-case doctrine, therefore, permits this court to revisit and modify Judge Thomas's finding of a pattern of discrimination.

IV. Discussion of statistical evidence

Plaintiff and Plaintiff-Interveners attempt to prove that Local Union 120 discriminated against black members by introducing statistical evidence prepared by Dr. Rebecca Klemm. The Court finds such statistical evidence legally insufficient because it fails to account for recall and special skills, two non-discriminatory explanations for the alleged disparities. Plaintiff's evidence is also unreliable because it does not accurately recreate workers' registration dates.

Even if the evidence's methodology were reliable, it would not show that Local Union 120 discriminated against blacks, because black members routinely received referrals at a rate higher than their percentage in the workforce. Finally, Plaintiff's evidence uses a faulty methodology for determining the hours allegedly lost due to discrimination. For these reasons, the Court concludes that Plaintiff's statistical evidence is insufficient to establish a pattern and practice of discrimination against black union members.

Appendix B

In Stage I of these proceedings, Judge Thomas found that the evidence produced at that time established a pattern or practice of disparate treatment in the operation of Local 120's referral system.[8] The Court based this conclusion primarily on "three separate findings of significant statistical differences in the total hours of white and black pipe fitters." *Id.* The Court made this finding upon statistical recreation of the sign up sheets.[9]

Plaintiff EEOC and Plaintiff-Interveners say that Defendant Local Union 120 discriminated against black local union members in making job referrals. Plaintiff-Interveners say this occurred from at least 1978 to 1992.

To determine what, if any, damages resulted from operation of the referral system, the Court ordered that a representative class be chosen. The Court assembled this class randomly, choosing the third person on the class list and every fifth name after that. The resulting sample had twenty-four black class members. After these twenty-four class members were chosen, the Court examined periods of unemployment suffered by these class members from 1978 to 1992.

Local Union 120 did not keep copies of Registration for Employment forms until 1988.[10] Because Local Union 120

---

8. See September 1, 1992, Memorandum and Order II at 89.

9. This analysis was flawed, because Dr. Rebecca Klemm's analysis does not credibly recreate the sign up sheets. See discussion *infra* pp. 16-18.

10. As related, Judge Thomas found that no adverse inference may be drawn from Local 120's failure to retain these records.

had not kept these records, it is difficult to accurately determine whether Local Union 120 referred a white pipe fitter before an earlier registered black class member.

To meet their burden of showing discrimination, Plaintiff EEOC and Plaintiff-Interveners relied upon a computer program formula to attempt to recreate registration dates for out-of-work pipe fitters. Using health and welfare payment reports from employers, the program attempted to create "windows" when class members may have been out of work and may have been passed over for referral by a white pipe fitter with a later out of work registration.

Statistical evidence may be used to prove the existence of racial discrimination. See *Teamsters*, 431 U.S. at 339.[11] To be legally sufficient, however, the statistical evidence

---

11. In *Teamsters*, the Court instructed:

> In any event, our cases make it unmistakably clear that "[s]tatistical analyses have served and will continue to serve an important role" in cases in which the existence of discrimination is a disputed issue. We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases. Statistics are equally competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

Teamsters, 431 U.S. at 339 (citations omitted).

must establish a significant racial disparity and must also eliminate the most common nondiscriminatory explanations for this disparity. See *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir.), *cert. denied*, 498 U.S. 878 (1990). Thus, when special qualifications are required to fill particular jobs, "comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Ste. Marie v. Eastern R.R. Ass'n*, 650 F.2d 395, 400 (2nd Cir. 1981) (citation omitted).

The Plaintiff and Plaintiff-Interveners rely upon Dr. Klemm's computer analysis. But as discussed, that program fails to account for several important non-race related variables. Klemm's analysis does not account for recalls. Under the collective bargaining agreements, employers have the right to call back any former employee within 100 days (or two calendar months during May 1, 1979 through April 30, 1982) after the employee ceases working for that contractor. Employers use recalls to fill many of their openings. Twenty-two percent of white pipe fitters take positions as the result of recall instead of referral.[12] Because of this contract rule, no employees receive referrals when an employer elects to recall a former employee. Klemm's program fails to account for this and creates resulting error.

Klemm's program also fails to take account of special skills. The evidence credibly shows that many referrals request pipe fitters with special skills or certification (e.g., welders, stainless steel welders, HVAC servicemen, sprinkler qualified pipe fitters). Class members may not have been eligible to

12. Black class members have a lower recall rate of 13%.

receive referrals given to the potential white "line cutters" because they were not qualified for the job in question.[13]

The Plaintiff and Plaintiff-Interveners' evidence also fails to account for referrals of apprentices. Local Union 120 does not refer apprentices to positions. The new referral system, effective March 30, 1972, states: "[a]ll Apprentice referrals shall be made by the Apprenticeship Committee. . . . It is recognized that these apprentices need varied on-the-job training as well as classroom instruction to acquire this expertise, and should be referred separately from journeymen." By failing to recognize that apprentice referrals are not made by Local Union 120, the Plaintiff and Plaintiff-Interveners create error in their calculations.

Plaintiff's evidence is legally inadequate because it does not eliminate race-neutral explanations for the alleged disparities. But more important, Plaintiff and Plaintiff-Interveners fail to show that the computer formula they use to create registration dates is otherwise methodologically accurate. Plaintiffs suggest out of work registration when an individual has worked more than the re-registration threshold[14]

---

13. As only one example, Klemm's program says that on December 2, 1991, white pipefitter Carter cut in front of nine class members with earlier registration under Klemm's program. But actual records show this referral was for a service man position. Carter was certified for this position. None of the nine class members identified by Klemm has having suffered discrimination were certified as a serviceman. See Defendant's Exhibit NN.

14. Local Union 120 members fell to the bottom of the registration list after they had worked 80 or 320 hours, depending upon the year.

and has changed employers or a gap of one or more months of employment occurs. This method does not appear to accurately position Local Union 120 members on out of work lists.

A comparison of out of work positions generated by Plaintiffs and Plaintiff-Interveners with actual out of work registration during periods where such actual registrations are available, show great error in the program. A valid program must accurately approximate the rank order of registration for a job referral.

Defendant Local Union 120 shows evidence of major errors in assigning rank ordering. For example, Plaintiffs compare white pipe fitter Cunningham with black pipe fitter Sanchez. Using Plaintiffs' formula, Sanchez was ranked 1575 places ahead of Cunningham on the out-of-work registration list. However, the actual registration lists exist for periods after 1988. Those actual lists show that Cunningham registered *before* Sanchez. The Sanchez example shows Plaintiffs' program does not accurately assign out of work registration dates.

To like effect is window 21, involving class member Coleman.[15] Because actual registration records are available, we know that class member Coleman actually received his referral *before* white pipe fitter Carter. Yet Dr. Klemm's program wrongly shows that Coleman received referral after Carter and wrongly says Coleman lost close to $40,000.00 from Carter's referral.

---

15. Plaintiff-Interveners withdrew claims as to window 21. The Court reviews window 21 because it reflects errors in the program used for all windows.

Appendix B

Dr. Gerald Barrett gave credible testimony showing significant flaws in the program Plaintiff and Plaintiff-Interveners relied upon. With Defendant's Exhibit LL, Barrett used Dr. Klemm's formula but did not suppress windows that showed the impossible widows with opening dates the same or later than closing dates.[16] This obvious error appeared in 26% of black pipe fitter windows and in 28% of white pipe fitter windows. Plaintiff and Plaintiff-Interveners gave no evidence explaining or rebutting this evidence showing serious error in the program used to approximate out-of-work registration dates.

Defendant's Exhibit DD further illustrates that Plaintiffs' program unreliably determines registration dates. In the exhibit, Defendant Local Union 120 used Plaintiff's computer program to decide if it accurately assigned white pipe fitters registration dates. Examining windows 17-22, Defendant Union shows that Plaintiff's computer formula reveals that many white pipe fitters cut line on other white pipe fitters. For example, Plaintiffs' computer formula for assigning registration dates says that twenty-nine white pipe fitters cut in line ahead of white pipe fitters L. Gaj during a February 1, 1989, to March 1, 1989, window.[17]

---

16. Dr. Klemm had inserted a command in her software program that suppressed windows with opening dates that were the same or later than the closing date of the window.

17. Other examples show the same. Plaintiffs' computer formula for assigning registration dates says that two hundred-ten white pipe fitters cut in line ahead of white pipe fitters L. Clark during a January 1, 1989, to May 1, 1989, window. Plaintiffs' computer formula for assigning registration dates says that seventy-five white pipe fitters cut in line ahead of white pipe fitters J. Boyle during a May 4, 1992, to August 1, 1992, window.

Appendix B

This evidence leads to either of two conclusions. More likely, it shows that Plaintiff's computer creation of registration dates is badly flawed. Less likely, it shows that Local Union 120 made out-of-order referrals that damaged individual white pipe fitters as much as black pipe fitters. If so, Plaintiffs fail to show that Local Union 120 discriminated based upon race.

As described, Plaintiff and Plaintiff-Interveners' computer program does not reliably assign out of work registration dates. However, even if, it did, it does not show a pattern and practice of discrimination.

Several examples highlight the failure to show a pattern and practice of discrimination by Defendant Local Union 120, even using the unreliable computer formula to assign workers to slots on out-of-work listings. For example, from January 1979, to December 1992, the Defendant Union referred black pipe fitters for open positions at a rate higher than their percentage of the workforce in 68% (114/168) of the months. During the same time, the Defendant Union referred white pipe fitters at a rate higher than their percentage of the workforce in only 32% (54/168) of the months.

A review of individual windows shows the unreliability of the Plaintiff-Interveners' computer formula and fails to show discrimination. Plaintiff-Interveners claim that Willie Coleman lost work from June 1, 1988, to July 1989, as the result of racial discrimination. Yet during those thirteen months, the percentage of black referrals exceeded the percent of black pipe fitters in the union in eight of the

thirteen months. Over the whole period, black pipe fitters received 8.77% of work referrals at a time when they made up approximately 7.5% of the workforce.

Review of other windows shows like results. In window 2, Plaintiff-Interveners claim that Local Union 120 discriminated against Ivory Baker in referrals during the period November 1, 1981, to February 10, 1982. Plaintiff-Interveners claim twenty-four white pipe fitters wrongly received referrals ahead of Baker during this period. Yet using Plaintiff's formula, Local Union 120 shows that four black pipe fitters also received referral ahead of Baker. Thus, during this window, black pipe fitters received 14% of the referrals at a time during which black pipe fitters only made up 6.5% of the Local Union 120 workforce. Even if Plaintiffs' program was accurate, it can make no showing that race motivated any lack of referrals during window 2 when Local Union 120 was referring black pipe fitters at a high rate. Other windows show similar results.[18]

---

18. A random sample of the every twentieth window shows this. Window 20 involves class member Coleman during the period April 17, 1990, to October 2, 1990. Using Plaintiff's data, black pipe fitters received 8% of the referrals at a time during which black pipe fitters only made up 6.5% of the Local Union 120 workforce.

Window 40 involves class member Huff during the period May 1, 1984, to August 1, 1984. Using Plaintiff's data, black pipe fitters received 8% of the referrals at a time during which black pipe fitters only made up 6.5% of the Local Union 120 workforce.

Window 60 involves class member Kee-Bey during the period August 22, 1989, to September 1, 1989. Using Plaintiff's data, black

(Cont'd)

Appendix B

Apart from the evidentiary problems described above, Plaintiffs and Interveners use a questionable method of determining lost hours for claimed discrimination. Dr. Klemm multiplied a constant for each window day. The constant purports to reflect the difference of white-black mean work hours per day.

However, factors beyond Local Union 120's control affect this. White pipe fitters have a higher recall percentage, a factor controlled by employers but not Local Union 120.[19]

(Cont'd)
pipe fitters received 24.49% of the referrals at a time during which black pipe fitters made up only 7.59% of the Local Union 120 workforce.

(Windows 40 and 60 were both withdrawn. Nevertheless, they are still useful to show methodological problems applicable to the remaining windows.)

Window 80 involves class member McCall during the period February 1, 1990, to April 10, 1990. Using Plaintiff's data, black pipe fitters receive d 9% of the referrals at a time during which black pipe fitters only made up 6.5% of the Local Union 120 workforce.

Window 100 involves class member Stewart during the period February 1, 1986, to December 2, 1986. Using Plaintiff's data, black pipe fitters received 6% of the referrals at a time during which black pipe fitters only made up 6.5% of the Local Union 120 workforce.

19. Recall is most frequently associated with long work experience. White pipe fitters tend to have greater numbers with long work experience. Thus, only four black pipe fitters had more than thirty years experience while about four hundred white pipe fitters had thirty years experience.

Because of this higher recall percentage, white pipe fitters have a higher mean of hours worked per day. Plaintiff and Interveners use this mean calculation to set lost hours though Defendant Local Union 120 has no control over recalls.

White pipe fitters also have a higher percentage of specialized workers.[20] Again, employers and specialization committees control special certification but not Local Union 120. Black pipe fitters with specialization have more hours than similarly specialized white pipe fitters. Because of this higher specialization percentage, white pipe fitters have a higher mean of hours worked per day. Plaintiff and Interveners use this mean calculation to set lost hours though Defendant Local Union 120 has no control over specialization.

The Court finds a more accurate lost hour determination would result from comparison with the actual hours obtained by a similarly situated white pipe fitter whom Local Union 120 referred during the class member's window. Defendant Local Union 120 made such a comparison of individual hours for all twenty-four sample plaintiffs. This comparison did not show loss of work hours. To the contrary, this comparison showed that black pipe fitters had more hours per referrals than the nearest similarly placed white pipe fitter.

---

20. Defendant Local Union 120 gives evidence that only three black pipe fitters (3% of Black pipe fitters) were HVAC servicemen while 129 whites (5.6% of white pipe fitters) were HVAC servicemen. Only 1.4% of three black pipe fitters claimed specialization in air conditioning service work while 8.4% of white pipe fitters claimed such specialization. Only 2.3% of three black pipe fitters claimed specialization in refrigeration work while 11.7% of white pipe fitters claimed such specialization.

Appendix B

To summarize, Judge Thomas stated that his finding of a pattern and practice of discrimination by Local Union 120 might require modification depending upon the state of the record after the stage II hearings. Even if Judge Thomas had not conditioned his finding of a pattern and practice of discrimination, there is good reason in this record to reexamine that finding.

First, the Court does not find Dr. Klemm's method of creating registration dates to be credible. Her program results in great error and is not reliable.

Second, even if Dr. Klemm's unreliable methodology is used, it shows that Local Union 120 did not have a pattern and practice of referring white pipe fitters ahead of black pipe fitters who had earlier registered for referral. Black pipe fitters received referrals at rates higher than their numbers in the Local Union 120 membership in 68% of the months from 1979 to December 1993, more than twice as frequently as white pipe fitters. Such hardly reflects a pattern and practice of discrimination.

Third, Dr. Klemm found black pipe fitters had fewer hours of work resulting from referrals. The Klemm program suggesting this is not reliable. Moreover, the Court credits Dr. Barrett's testimony that recalls and special skills, factors beyond Local Union 120's control, account for hours disparity.

For these reasons, the Court finds no pattern and practice of discrimination in Local Union 120's job referral system during the 1978 to 1992 period.

Appendix B

V. Review of individual claims

As related, the Court therefore finds that Plaintiff's and Plaintiff-Interveners' evidence is insufficient to establish a pattern or practice of discrimination. Even if the Court did not revisit this prior determination, and shifted the burden of production to Defendant according to *Teamsters*, 431 U.S. at 359, Plaintiffs would still not be entitled to relief. Defendant Local 120 can rebut the presumed existence of discrimination with respect to each individual window.

The Court reviews evidence offered as to individual windows. Plaintiff-Interveners presented no direct evidence of discrimination. In reviewing these individual windows, the Court examines whether circumstantial evidence suggests that Local Union 120 discriminated in job referrals.

In reviewing circumstantial evidence of actions taken up to twenty years ago, the Court first looks to Local Union 120's referrals. At the time of the window, did Local Union 120 make referrals to white pipe fitters in much higher percentages than to black pipe fitters? Of somewhat less import, the Court examines whether the percentage of black pipe fitters working was greater or lesser than the percentage of white pipe fitters who were then working.

Because actual registration evidence is not available, the Court needs to decide if the subject class member was available for work. Because Local Union 120 use travelers only when local union members were not available for referrals, the Court examines the use of travelers during the subject window as evidence of whether the class member

was available for referral. The Court also examines testimony and other evidence to decide whether class members were available for referral.

To begin the review of individual windows, Plaintiff-Interveners have withdrawn all claims for 39 of the original 118 windows. Under these withdrawals, no longer before the Court are windows 7, 13, 14, 15, 16, 17, 21, 25, 27, 29, 30, 31, 33, 34, 35, 39, 40, 41, 43, 46, 47, 50, 59, 60, 64, 68, 79, 81, 84, 85, 89, 94, 98, 108, 111, 112, 113, 114, and 116.[21]

---

21. Thus Plaintiff-Interveners withdraw the following windows:

Window Number	Pipefitter	Window Start	Window Finish
No. 7	Beasley	June 1, 1982	July 19, 1982
No. 13	Carroll	December 1, 1985	January 1, 1986
No. 14	Carroll	August 1, 1986	September 1, 1986
No. 15	Clark	September 1, 1988	December 1, 1988
No. 16	Clark	May 1, 1989	August 1, 1989
No. 17	Coleman	July 1, 1986	August 21, 1986
No. 21	Coleman	November 25, 1991	December 2, 1991
No. 25	Dandridge	August 7, 1989	October 1, 1989
No. 27	Dandridge	October 29, 1990	October 31, 1990
No. 29	Dandridge	September 29, 1992	February 1, 1993
No. 30	Ferguson	March 1, 1985	April 1, 1985
No. 31	Ferguson	November 1, 1986	December 1, 1986
No. 33	Ferguson	September 1, 1989	October 1, 1989
No. 34	Ferguson	September 1, 1992	November 16, 1992
No. 35	Fuller	May 1, 1979	July 1, 1979
No. 39	Guy	November 1, 1983	January 16, 1984
No. 40	Guy	July 1, 1984	September 30, 1985

(Cont'd)

Appendix B

Because Plaintiff-Interveners have withdrawn their claims as to these windows, Defendant Local Union 120 should receive judgment as to them.

As related, Plaintiff-Interveners argue that Local Union 120 discriminated against black pipe fitters in job referrals. In support of their claims, Interveners give no direct evidence showing discrimination in job referrals. Without direct evidence, the Court finds most probative the comparison of

---

(Cont'd)

No. 41	Huff	February 1, 1983	March 14, 1983
No. 43	Huff	February 1, 1985	September 1, 1985
No. 46	Jennings	May 1, 1981	June 1, 1981
No. 47	Jennings	May 1, 1984	June 26, 1984
No. 50	Jennings	September 1, 1987	October 12, 1987
No. 59	Kee-Bey	May 26, 1989	June 1, 1989
No. 60	Kee-Bey	August 22, 1989	September 1, 1989
No. 64	Lawrence	February 1, 1986	March 1, 1986
No. 68	Lawrence	November 8, 1990	November 13, 1990
No. 79	McCall	June 1, 1989	September 1, 1989
No. 81	McCall	September 1, 1990	October 8, 1990
No. 84	Merriweather	June 12, 1985	August 4, 1986
No. 85	Murphy	August 1, 1983	September 20, 1983
No. 89	Donald Nunn	January 1, 1983	February 3, 1983
No. 94	Donald Nunn	June 1, 1990	November 12, 1990
No. 98	Stewart	November 1, 1983	January 1, 1984
No. 108	Thomas Jr.	July 1, 1990	July 3, 1990
No. 111	Thomas Jr.	May 15, 1992	December 28, 1992
No. 112	Williams	November 1, 1990	February 1, 1991
No. 113	Williams	January 1, 1992	February 1, 1992
No. 114	Young Jr.	December 1, 1981	January 11, 1982
No. 116	Young Jr.	August 1, 1983	September 10, 1983
No. 117	Young Jr.	April 1, 1985	June 21, 1985
No. 118	Young Jr.	April 1, 1986	February 1, 1988

white pipe fitter referrals to black pipe fitter referrals. Making this comparison, the Court finds that Local Union 120 referred black pipe fitters for employment at a higher rate than white pipe fitters in many months.[22]

By showing that black pipe fitters were referred at numbers higher relative to their numbers than white pipe fitters, Local Union 120 rebuts any inference drawn from a pattern and practice of discrimination finding. Obviously, the same showing stops Plaintiff-Intervenors' claim for damages absent the pattern and practice of discrimination finding.

The Court finds that Local Union 120 can rebut a pattern and practice of discrimination during those periods when the percentage of total referrals received by blacks was equal to or greater than their percentage within the workforce. In other words, the evidence shows there is no discrimination in referrals during those periods where black pipe fitters received higher percentage of referrals when compared with their respective numbers in the workforce.

The Court gives examples that show this. With window 1, Plaintiff-Interveners seek damages for black pipe fitter Ivory Baker for the period August 1, 1981, to September 28, 1981. In support of this request for damages, Interveners give no direct evidence of discrimination. Finding no direct evidence, the Court reviews circumstantial evidence. During window 1, circumstantial evidence shows that black pipe fitters

22. The Court compares the percent of referrals going to white pipe fitters and black pipe fitters in relation to their respective percentage of the workforce.

made up 6.35% of the Local Union 120 workforce. During window 1, black pipe fitters received 5 of 45 or 11% of the referrals. Having no other evidence to support an inference of discrimination, Plaintiff-Interveners cannot plausibly make claim for damages for window 1.

A random survey of other windows shows the same result. For example, in window 10, black pipe fitters make up 7.39% of the workforce but received 12.05% of the job referrals. In window 20, black pipe fitters make up 7.39% of the workforce but received 15.09% of the job referrals. In window 30, black pipe fitters make up 7.69% of the workforce but received 9.43% of the job referrals. In window 40, black pipe fitters make up approximately 7.4% of the workforce but received 10.8% of the job referrals.[23] In window 50, black pipe fitters make up 8% of the workforce but received 11.22% of the job referrals.

As described above, the Court has found that Local Union 120 employed no pattern or practice of discrimination in its referral system during the period here involved. However, even if Local Union 120 had been found to have engaged in such a pattern of discrimination, the Court finds that the evidence of high black pipe fitters referrals rebuts the suggestion of discrimination in those windows in which black pipe fitters referrals exceeds their respective percentage of the referral population.

Having no direct evidence of discrimination and having no other credible circumstantial evidence suggesting

---

23. Plaintiff-Intervenors withdrew window 40 yet it remains illustrative of whether discrimination occurred as a regular course.

discrimination, the Court finds that Plaintiff-Interveners should not recover during those windows in which black pipe fitters' referrals exceed their representation in the workforce.

The Court therefore excludes those windows where black pipe fitters received a greater proportion of referrals than their percentage in the workforce.[24] Under this criterion, the Court finds Plaintiff-Interveners can recover no damages for ninety-five windows. The Plaintiff-Interveners have withdrawn claim for some of these windows.[25] Besides the windows withdrawn, this criterion requires exclusion of claims for windows 1, 2, 3, 4, 8, 9, 10, 11, 12, 18, 19, 20, 24, 26, 28, 36, 37, 38, 42, 45, 48, 51, 52, 53, 54, 55, 56, 57, 60, 61, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78, 80, 82, 83,

---

24. The actual percentage of blacks in the data file on a window-to-window basis is not before the Court. The Court therefore computed for the entire period the average monthly percentage of blacks in the data file. Each month's percentage of blacks in the data file was added (total 1179.72) and divided by the total number of months (168) to get an average monthly percentage of 7.02%. This percentage was then compared with the percentage of total referrals that went to blacks in each individual window.

25. As described, Plaintiff-Interveners have withdrawn claim for certain windows. Among the windows withdrawn, the Court would find that Plaintiff-Interveners can not recover damages for windows in which black pipe fitters received higher rates of referrals than their percentage of the Local Union 120 population. Using this criteria, Plaintiff- Interveners cannot recover damages for windows 7, 13, 14, 16, 17, 21, 25, 27, 30, 33, 34, 35, 39, 40, 41, 43, 47, 50, 60, 68, 79, 81, 84, 85, 94, 98, 108, 112, 113, 114, 116, 117, and 118.

Appendix B

86, 87, 88, 90, 91, 92, 93, 95, 96, 99, 101, 102, 103, 104, 105, 106, 107, 109, and 115.[26]

---

26. Thus, the Court finds that Plaintiff-Interveners cannot recover for the following windows:

Window Number	Pipefitter	Window Start	Window Finish
1	Baker	August 1, 1981	September 28, 1981
2	Baker	November 1, 1981	February 10, 1982
3	Baker	October 1, 1982	November 1, 1982
4	Baker	April 1, 1985	September 22, 1985
8	Beasley	October 1, 1984	July 29, 1985
9	Beasley	January 1, 1986	April 10, 1990
10	Beasley	May 31, 1990	July 6, 1990
11	Beasley	October 1, 1990	October 8, 1990
12	Beasley	December 26, 1990	August 10, 1992
18	Coleman	November 1, 1986	August 10, 1987
19	Coleman	June 1, 1988	August 1, 1989
20	Coleman	April 17, 1990	October 2, 1990
24	Dandridge	November 1, 1987	May 1, 1989
26	Dandridge	February 8, 1990	September 1, 1990
28	Dandridge	July 3, 1991	April 21, 1992
36	Fuller	May 1, 1982	July 24, 1982
37	Fuller	July 1, 1985	October 1, 1985
38	Fuller	February 1, 1986	July 1, 1988
42	Huff	May 1, 1984	August 1, 1984
45	Huff	February 1, 1988	October 14, 1992
48	Jennings	February 1, 1985	September 18, 1985
51	Jennings	October 27, 1988	August 1, 1989
52	Jennings	September 11, 1989	January 30, 1990
53	Jennings	April 3, 1990	September 25, 1990
54	Jennings	January 22, 1991	April 23, 1991
55	Jennings	July 30, 1991	January 1, 1993
56	Kee-Bey	June 1, 1985	July 20, 1987

(Cont'd)

Appendix B

(Cont'd)			
57	Key-Bey	December 1, 1987	July 14, 1988
61	Kee-Bey	April 24, 1991	July 25, 1991
66	Lawrence	October 1, 1989	January 16, 1990
67	Lawrence	June 1, 1990	July 10, 1990
68	Lawrence	November 8, 1990	November 13, 1990
69	Lawrence	July 9, 1991	March 1, 1992
70	Longmire	May 1, 1985	August 8, 1985
72	Longmire	July 1, 1986	July 15, 1988
73	Longmire	September 7, 1988	June 1, 1989
74	Longmire	February 1, 1990	August 28, 1990
75	Longmire	November 12, 1990	May 30, 1991
76	McCall	May 1, 1985	October 16, 1985
77	McCall	March 1, 1986	January 6, 1987
78	McCall	November 1, 1987	March 1, 1989
80	McCall	February 1, 1990	April 10, 1990
82	McCall	December 1, 1990	January 5, 1991
83	McCall	July 30, 1992	January 1, 1992
86	Murphy	July 1, 1984	August 15, 1985
87	Donald Nunn	February 1, 1980	April 19, 1980
88	Donald Nunn	January 1, 1981	March 2, 1981
90	Donald Nunn	April 1, 1985	September 1, 1985
91	Donald Nunn	January 1, 1986	March 1, 1989
92	Donald Nunn	May 17, 1989	August 1, 1989
93	Donald Nunn	November 1, 1989	May 15, 1990
95	Donald Nunn	January 28, 1991	January 1, 1993
96	Rates	August 1, 1987	October 7, 1987
99	Stewart	October 1, 1984	June 1, 1985
101	Stewart	July 10, 1987	July 28, 1988
102	Stewart	February 1, 1990	March 10, 1990
103	Stewart	June 5, 1990	October 9, 1990
104	Stewart	January 18, 1991	October 8, 1992
105	Thomas Jr.	May 1, 1985	August 5, 1985
106	Thomas Jr.	January 1, 1986	March 31, 1986
107	Thomas Jr.	August 24, 1989	January 16, 1990
109	Thomas Jr.	July 1, 1991	September 1, 1991
115	Young Jr.	May 1, 1982	October 29, 1982

Appendix B

As described, the Court finds the rate of referral in relation to percentage within the Local Union 120 population most relevant to deciding whether Local Union 120 discriminated in referrals. Although somewhat less probative of the Union's referral practices, comparison of the percentage of blacks who worked in a period with the percentage of white pipe fitters suggests whether Local Union 120 discriminated in job referrals. Using these criteria, black pipe fitters had a higher percentage working during at least one month during at least 36 windows.[27] Among these 36 windows, most are either withdrawn or no damages can be given because black pipe fitters received high rates of referrals during the window.[28]

The Court therefore finds no right to recover for windows in which the percentage of blacks working was equal to or greater than the percentage of whites who worked. That a higher percentage of blacks than whites worked in these windows rebuts the presumption that the Union systematically discriminated against black pipe fitters. Indeed, it suggests that Local 120's referral policy was more beneficial to blacks than to whites.

Besides the above considerations, the Court finds that it should eliminate windows with a net increase in the number

---

27. Windows Nos. 1, 2, 3, 6, 7, 11, 20, 27, 35, 36, 39, 40, 41, 42, 45, 46, 47, 55, 68, 75, 81, 83, 85, 86, 87, 88, 89, 94, 95, 98, 103, 111, 112, 114, 115, and 116.

28. Among the 36 windows in which black pipe fitters worked at a higher percentage than white pipe fitters, all were withdrawn or excluded for the above reason except window No. 6.

of travelers. If the Union is adding travelers in a given month, the additions suggest not enough local workers had registered as willing to work. As a result, the Union had to go elsewhere to find workers.[29] This in turn shows that Local Union 120 "passed over" blacks because they I had failed to register for work, not because of Union discrimination. In 85 windows travelers were added. Among these windows, a number had also been withdrawn by Plaintiff-Interveners.[30] Also, the Court has found that black referrals exceeded their numbers in the workforce in additional windows.[31] Besides the window excluded for the above reasons, this criterion requires that the additional windows No. 5, 6, 22, 23, 44, 49, 58, 62, 65, 71, 97, 100, and 110 should be excluded.[32]

---

29. The Defendant proposes that any window where the number of travelers was above zero can be excluded. However, the pertinent criterion is the months where the number of travelers was increasing. The latter criterion isolates the addition of new travelers, while the Defendant's could reflect carryover from a prior month.

30. Among the windows where travelers were added, Plaintiff-Interveners had withdrawn claim for windows 7, 15, 27, 29, 34, 35, 39, 40, 41, 43, 46, 68, 81, 84, 85, 94, 98, 111, 112, 114, 116, and 118.

31. Among the windows where travelers were added, the Court has found Local Union 120 referred black pipe fitters at a higher rate than their numbers in the workforce, in windows 1, 2, 3, 4, 7, 9, 11, 12, 18, 19, 20, 24, 26, 27, 28, 34, 35, 36, 38, 39, 40, 41, 43, 45, 48, 51, 53, 55, 56, 57, 66, 67, 68, 69, 72, 73, 74, 75, 76, 77, 78, 80, 81, 83, 84, 85, 86, 87, 88, 90, 91, 93, 94, 95, 98, 101, 102, 103, 104, 107, 109, 111, 112, 114, 115, 116, and 118.

32. The Court reached this conclusion by identifying the months with a net increase in travelers over the previous month. (Cont'd)

Appendix B

Having found that Plaintiff-Interveners have withdrawn certain windows, having found that no inference of discrimination can be found during months in which black pipe fitters referrals exceed their percentage of the workforce, having found that black pipe fitter class members were not available for work during months during which travelers were added, and having found that any difference in hours worked reflects recalls and different specializations, the Court finds that Plaintiff-Interveners show no right to damages.[33]

(Cont'd)
The months where the net number of travelers increased were: 3-79, 4-79, 5-79, 6-79, 7-79, 8-79, 10-79, 11-79, 12-79, 1-80, 2-80, 3-80, 6-80, 7-80, 8-80, 12-80, 1-81, 2-81, 3-81, 5-81, 6-81, 7-81, 9-81, 1-82, 6-82, 8-82, 9-82, 10-82, 11-82, 12-82, 2-83, 4-83, 6-83, 7-83, 8-83, 9-83, 10-83, 12-83, 1-84, 3-84, 4-84, 8-85, 9-85, 10-85, 5-86, 6-86, 9-86, 12-86, 3-87, 5-87, 6-87, 7-87, 11-87, 1-88, 4-88, 6-88, 7-88, 9-88, 10-88, 12-88, 1-89, 12-89, 2-90, 6-90, 8-90, 9-90, 10-90, 11-90, 8-91, 2-92, 3-92, 5-92, 9-92, and 12-92. The Court then compared these months with the opening and closing dates of the widows. If the window contained at least one month with a net increase in travelers, it was eliminated.

33. As described, the Court excludes windows that have been withdrawn, windows where Black pipe fitters received referrals at rates higher than their percentage of the Union population, and windows where there was net increases in travelers. When excluded, only window 63, involving black pipe fitter Nathan Kee-Bey remains. Plaintiff-Interveners make claim on behalf of Kee-Bey for the window from July 6, 1992, to September 2, 1992. But during this time, travelers remained the same in August and increased slightly in September. The Court finds that window 63 should be excluded as well.

Appendix B

VI. Conclusion

The Court denies Plaintiff-Interveners' request for additional relief. This Court's earlier finding that Local Union 120 practiced a pattern and practice of discrimination in job referrals is subject to review. In his earlier order, Judge Thomas explicitly stated that this finding would be subject to modification based upon evidence produced at this Stage II hearing. Additionally, the evidence produced to this Court causes the Court to find that the earlier finding of a pattern and practice of discrimination is clearly erroneous and would work a manifest injustice.

This Court's earlier finding of a pattern and practice of discrimination is clearly erroneous. First, the methodology used to approximate out-of-work periods is extremely inaccurate. Because this inexactness has major effect upon placement on out-of-work registration lists, it discredits Plaintiff-Interveners' claims. Second, the methodology completely fails to account for recalls and request for specialized skills. Because recalls and requests for specialized skills make up a large portion of job placements and because Local Union 120 has no control over them, this failure to account for recalls and special skills invalidates Plaintiff-Interveners' claim for damages. Third, even if Plaintiff-Interveners' methodology were sufficiently accurate, which it is not, Local Union 120 has rebutted Plaintiff-Interveners' claims for damages.

For these reasons, the Court denies Plaintiff-Interveners' request for additional relief.

IT IS SO ORDERED.

Dated: June 25, 1998

s/ James S. Gwin
Judge James S. Gwin
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED AND FILED FEBRUARY 28, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

C68-473

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

GEORGE D. EDWARDS, et al.,

Plaintiff-Intervenors,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL NO. 120, et al.,

Defendants.

ORDER

Appendix C

THOMAS, Senior Judge

On February 9, 1993, Plaintiff Equal Employment opportunity Commission filed with the Court and served on all parties its RECOMMENDATION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION WITH REGARD TO THE MODIFICATION OF CERTAIN OF THE REPORTING REQUIREMENTS FOUND IN THE CONSENT DECREE. These Recommendations were considered at a hearing held on February 10, 1993, at which time all parties were heard. This Order addresses the modification of reporting requirements imposed by the Amended Consent Decree on all defendant contractors.

I.

Paragraph 7 of the Revised Consent Decree requires that every contractor request for referral of pipefitters be confirmed in writing within three business days. The form attached to this Order as Exhibit 1 shall be used by all defendant contractors in confirming each oral referral request made on and after March 1, 1993. Each contractor shall permanently retain copies of all written referral requests submitted to the Union until further order of the Court.

II.

Paragraph 14 of the Revised Consent Decree is hereby modified to delete the requirement that monthly reports be filed with the Court and all counsel. Each defendant contractor shall include all information required by Paragraph 14 in its monthly reporting form filed with the Union, and

shall permanently retain a copy of the form until further order of the Court. Counsel for Plaintiff and Plaintiff-Intervenors shall have the right at reasonable times to inspect and copy any of these forms, either at the office of the contractor or the office of the Union. Attached as Exhibit 2 to this Order is a Reporting Compliance Memorandum which sets forth the method of reporting each required item of information. The requirements imposed on defendant contractors by this paragraph shall be effective for all reporting periods starting on or after March 1, 1993.

IT IS SO ORDERED.

s/ William K. Thomas
William K. Thomas
United States Senior District
Judge

Appendix C

EXHIBIT 1

MECHANICAL CONTRACTORS' ASSOCIATION

PIPE FITTER REFERRAL REQUEST

This form must be completed and sent or faxed to Pipe Fitters Local #120, 6305 Halle Dr., Cleveland, Ohio 44125 (Fax No. 524-2385) within three (3) business days after each oral referral request is made.

To:_____
(Business Agent)

From:_____ By:_____
(Contractor Name) (Signature)

Date:_____ _____

This will confirm the oral referral request made on _____ as follows:
(Date)

Job Site:_____

_____

Starting Date for Referrals:_____

Estimated Length of Job:_____

Appendix C

Special Conditions, if any:_____

_____

Referrals Required (Insert Number)

Pipe Fitters_____
Sprinkler Fitters_____
Special Skills (list skills required)_____

_____

Key Person_____
(Name and Position — Foreman,
General Foreman, Supervisor)

Recall_____
(Name)

Service Person_____

Other_____

Appendix C

EXHIBIT 2

REPORTING COMPLIANCE MEMORANDUM

Amended Paragraph 14 of the Revised Consent Decree requires each contractor to report specified information on the Union monthly reporting form as follows:

> The name, social security number, race, classification as journeyman or journeyman- trainee or apprentice, status as a member or traveller or permit man, rate of pay and the number of regular hours, overtime hours and total hours worked by each person employed as a pipefitter to the jurisdiction of the Union. With respect to any employee who has entries in the "starting this month" and/or "terminated this month" column, the date or dates on which said employee started and/or was terminated shall be set forth.

This information will be reported as follows:

Name and Social Security Number: This information will be inserted in the appropriate columns on the form.

Race: A racial designator (B-Black; H-Hispanic; A-Asian or Pacific Islander; I-American Indian or Alaskan Native) will be placed to the right of the name of each non-Caucasian employee for whom a report is made.

Classification: The employee's classification can be determined by the column in which his work hours are reported. No specific indication need be provided.

Appendix C

Status: Travellers shall be designated by placing a "T" to the right of the employee's name. Permit men shall be designated by placing a "P" to the right of the employee's name. All other employees are assumed to be Local 120 members and no designation need be given.

Rate of Pay: The employee's rate of pay need not be added to the form, since it can be determined by reference to the current collective bargaining agreement based upon the column in which work hours are reported.

Regular Hours, Overtime Hours and Total Hours: This information should be inserted on the form in the appropriate columns as now reported. No additional information need be provided.

Starting This Month/Terminated This Month: For each employee who starts to work during a reporting period, an "X" must be placed in the "S/T" column on the form and the employee's starting date written in the open area on the employee's report line as follows: "Start 00/00/00".

For each employee terminated during the reporting period, an "X" must be placed in the "S/T" column and the last day of work written in an open area on the employee's report line as follows: "Terminated 00/00/00".

For employees both starting and terminated during the reporting period, both dates must be written on the employee's report line in the form set forth above.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO DATED AND FILED OCTOBER 29, 1992

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

C68-473

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

GEORGE D. EDWARDS,

Plaintiff-Intervenors,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL NO. 120, et al.,

Defendants.

ORDER

Appendix D

THOMAS, Senior Judge

This matter came on for hearing on October 29, 1992, on the motion of the Equal Employment Opportunity Commission ("EEOC"), for certification of a class of defendant contractors pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure. Following the service of notice upon the putative class members, two pleadings were filed with this Court: a motion to intervene pursuant to Rule 24 filed by Crest Energy Services, Inc. ("Crest"), and a brief in opposition to the certification of the putative class, filed by the Pneumatic Contractors Association Council ("PCSC").

On the basis of the arguments of counsel and a review of the applicable rule, and without opposition from the parties, the motion of Crest to intervene in this action as a defendant pursuant to Rule 24, Federal Rules of Civil Procedure, is granted.

On the basis of the arguments of counsel, a review of the applicable case law, and after considering portions of the record, including exhibits introduced this day, the Court hereby denies the motion of the EEOC to certify a class of defendants pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure. However, this Court shall treat the EEOC's moving papers as a motion to Join Unwilling Party Defendants pursuant to Rule 19(a) and Rule 21, Federal Rules of Civil Procedure, and hereby grants this motion.

The Court makes the following findings relevant to this order:

Appendix D

1. On January 20, 1972, this Court issued a Consent Decree in this case. Paragraph 7 of that Consent Decree provides as follows:

> Requests for referral of employees through the Union shall be made in writing specifying the number of journeymen and journeymen-trainees required; provided, that a request for referral of employees may be made orally by an employer subject to later confirmation in writing as above provided within not more than three business days thereafter.

2. Paragraph 14 of that Consent Decree, in part, provides as follows:

> [E]ach contractor employing members of the Union shall file with the Court and serve upon all counsel a copy of the form presently in use for reporting contributions to the fringe benefit funds for such calendar month, setting forth the name, social security number, race, classification as a journeyman or journeyman-trainee or apprentice, status as a member or traveler or permit man, rate of pay, and the number of regular hours, overtime hours and total hours worked by each person employed as a pipe fitter subject to the jurisdiction of the Union.

3. As a result of the hearings which have been held in this case leading up to the orders issued September 1, 1992, (wherein this Court found that Defendant Local No. 120 had failed to comply with certain provisions of the Consent

Decree), it has been learned that the contractors which utilize the referral services of Local No. 120 have not been complying with the provisions of Paragraph 7 and Paragraph 14.

4. The Court finds that the joinder of each contractor is required to secure compliance with the provisions of Paragraphs 7 and 14 of the Consent Decree. However, this Court will hereafter consider, pursuant to the motion of a party, reasonable modifications of the reporting requirements of Paragraphs 14 and 15 of the Consent Decree.

5. This Court finds that joinder of each contractor using the services of the hiring hall of Defendant Local 120 is necessary to avoid the imposition of inconsistent obligations on the parties to these proceedings and to insure that complete relief is granted prospectively to the Plaintiff, Plaintiff-Intervenors and class.

6. Each contractor which utilizes the hiring hall operated by Local No. 120 has an interest in the referral of qualified pipefitters consistent with the mandates of this Court. By joining each of these contractors as defendants in this case, each will be capable of protecting that interest.

7. Compliance with the provisions of Paragraph 7 and Paragraph 14 (or any reporting modifications thereof) by those contractors which utilize the hiring hall operated by Local No. 120 is essential to the successful operation of the Consent Decree as modified by any subsequent order of this Court.

Appendix D

8. Each party being joined pursuant to this Order is a heating, plumbing, piping, air conditioning, refrigeration, and/or mechanical contractor which employs journeymen, apprentices, and other individuals represented by Local No. 120 on work coming within the trade, craft and geographical area jurisdiction of Local No. 120. More specifically these contractors are either members of the Mechanical Contractors' Association of Cleveland, Inc. ("MCA"); contractors who, while not members of the MCA have agreed to be bound by the collective bargaining agreement entered into between Local No. 120 and the MCA; or contractors who, while not bound directly by the collective bargaining agreement entered into between Local No. 120 and the MCA, are covered by the terms of a separate national agreement entered into between these contractors, either directly or through an employer association, and the United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada. The list, attached as Attachment A, contains the names of the contractors currently known to the Court.

9. This Court finds that the contractors to which this order will apply are listed in Attachment A, hereto, and, pursuant to Civil Rule 21, directs that each contractor be joined as a party defendant. This Order, along with a summons, shall be served upon each such new party defendant. The September 1, 1992 rulings previously referenced, as well as the Consent Decree and other papers in this case, are available for review at the office of the Clerk of Courts, United States District Court for the Northern District of Ohio, 201 Superior Avenue, N.E., Cleveland, Ohio 44114.

10. Within twenty (20) days of service of this Order, each new party defendant may, consistent with Civil Rules 5(c) and 12(a) file a responsive pleading. Any such pleading shall be filed with the Clerk of Courts and served upon the counsel listed in paragraph 11 of this Order.

11. Pursuant to Rule 16 this Court directs that the joinder of these additional defendants and the entry of the "New Referral System Memorandum" and the "Final Order and Judgment" shall proceed expeditiously. Furthermore, the Court designates the following counsel of record to receive service of pleadings, compliance reports, or other papers:

Counsel for the EEOC:

Charles Guerrier
Senior Trial Attorney
Equal Employment opportunity commission
Cleveland District Office
1375 Euclid Avenue, Suite 600
Cleveland, Ohio 44114

Counsel for the Plaintiff-Intervenors and Class:

Bruce B. Elfvin
Elfvin & Besser
2924 East Overlook
Cleveland, Ohio 44118-2434

Appendix D

Counsel for Defendant, Pipefitters, Local 120:

Frank D. Celebrezze
Rubenstein, Novak, Einbund, Pavlik
& Celebrezze
Second Floor
Skylight Office Tower
Cleveland, Ohio 44113

Counsel for Defendant MCA:

Richard V. Whelan, Jr.
Thompson, Hine & Flory
1100 National City Bank Building
Cleveland, Ohio 44114

12. Any defendant joined by this order may appear in person or by counsel and represent its interests at any time on any matter that may arise in this civil action.

13. A final hearing to approve the "New Referral System" and to enter the "Final Order and Judgment" in this case shall be held at 9:00 a.m. on December 17, 1992, in Courtroom 202, United States District Court, Northern District of Ohio, 201 Superior Avenue, N.E., Cleveland, Ohio.

s/ William K. Thomas
United States Senior District
Judge

BEST AVAILABLE COPY

Mr. Stan Raskin
American Piping Corp.
1450 E. 357th St.
Eastlake, Ohio 44095

Mr. Mark Bassett
Bassett Sprinkler Prot.
4250 West 130th Street
Cleveland, Ohio 44135

Mr. Jeffrey Zellers
The Brewer-Garrett Co.
6800 Eastland Road
Middleburg Hts., Ohio
44130

Mr. Marvin Clark
Clark Mech., Inc.
4365 Cranwood Pkwy.
Warrensville Hts. OH 44128

Mr. Charles Coleman
Charles Coleman Corp.
P.O. Box 28577
Cleveland, Ohio 44128

Mr. Dave Tamburro
Consolidated Air Comfort
7438 Pearl Road
Middleburg Hts., Ohio 44130

Mr. John Powell
Daly Refrigeration Co.
7700 Marble Avenue
Cleveland, Ohio 44105

Mr. John A. Sabo
Energy Mechanical
24461 Detroit Road
Westlake, Ohio 44145

Mr. Sherm Mattocks
Feldman, Inc.
8370 Macedonia Corporate
Park Rd.
Macedonia, OH 44056

Ms. Marie Skedel
Four Seasons Heating &
Cooling, Inc.
2236 W. Wallings Road
Brookview Hts., Ohio 44147

Mr. John F. Gallagher
The John F. Gallagher Plbg. Co.
36360 Lakeland Blvd.

Mr. Leon Chill
Automatic Sprinkler
19668 Progress Drive
Strongsville, Ohio 44136

Mr. C. Mark Harris
E. E. Betz, Inc.
10351 Norwalk Road
Litchfield, Ohio 44253

Mr. Jack E. Soltis
Charles-Steven, Inc.
P.O. Box 360
North Kingsville, OH 44068

Mr. Ray P. Bohdal
Cleveland Mechanical, Inc.
3470 East 50th Street
Cleveland, Ohio 44127

Mr. Charles Coleman
Charles Coleman Corp.
13715 Kinsman Road
Cleveland, Ohio 44120

Ms. Joan Bammerlin
Continental Control Systems, Inc.
54 Monticello
Brunswick, Ohio 44212

Mr. E.R. Detrick
Detrick Industrial Piping Comp.
4102 Creek Road
Conneaut, Ohio 44030

Mr. Richard Starr
The Enterprise Corporation
6858 Cochran Road
Solon, Ohio 44139

Mr. Robert M. Rubin
Feldman, Inc.
8370 Macedonia Corporate
Park Rd.
Macedonia, OH 44056

Mr. Brad Chill
Fox Fire Protection
15300 Pearl Road
Strongsville, Ohio 44137

Mr. Ted Burman
Geauga Mechanical Co.
28954 Chardon Road

Mr. Jerry Wilhem
Avery Engineering
1455 East Schaff Rd.
Cleveland, Ohio 44131

Mr. David A. Laska
The Brewer-Garrett Co.
6800 Eastland Road
Middleburg Hts., Ohio 44130

Mr. Marvin Clark
Clark Mech., Inc.
P.O. Box 39264
Solon, Ohio 44139

Mr. Lonzo Coleman
Colejon Corp.
13836 Union Avenue
Cleveland, Ohio 44120

Mr. Bill Snyder
S.A. Comunale Comp., Inc.
70 East North Street
Akron, Ohio 44304

Mr. Gregory Glassner
Cull's Sales & Service
1313 Bagley Road
Berea, Ohio 44017

Mr. Paul S. Galletti
Diversified Piping Co., Inc.
4770 Briar Rd.
Cleveland, Ohio 44135

Mr. Ken Myers
The Enterprise Corporation
6858 Cochran Road
Solon, Ohio 44139

Mr. Brett Jones
Five Star Refrigeration, Inc.
9816 Sherman Rd.
Munson, OH 44026

Mr. Francis J. Burns
G & B. Mechanical, Inc.
3300 King Avenue
Cleveland, Ohio 44114

Mr. Timothy M. Lavelle
Gorman-Lavelle Corp.
3459 East 52nd Place

Ms. Margaret Ruebensaal
Great Lakes Mechanical Corp.
5602 Denison Avenue
Cleveland, Ohio 44101

Jackie Hammond
Hammond Mechanical Corp.
P.O. Box 17048
Euclid, Ohio 44117

Mr. Paul Roberts
Hussmann Corporation
6611 W. Snowville Road
Brecksville, Ohio 44131

Mr. David Gill
Johnson Controls, Inc.
Systems & Service Div.
9797 Midwest Avenue
Garfield Hts., Ohio 44125

[illegible] Elton B. Katz
[illegible]. Katz Company
930 East 70th Street
Cleveland, Ohio 44103

Mr. Edward Ledyard
Ledyard Mechanical Corp.
P.O. Box 10420
1145 Galewood Drive
Cleveland, Ohio 44110

Mr. Gary Brooks
Lynn Mechanical
10850 Prouty Road
Concord, Ohio 44077-2312

Mr. Thomas Wright
Marlin Mechanical Contrs., Inc.
4812 E. 47th St.
Cleveland, Ohio 44103

Mr. Anthony F. McDevitt
McDevitt Mechanical Contractors, Inc.
1789 East 45th Street
Cleveland, Ohio 44103

Mr. Lou Barton
Moreland Mechanical
8551 Berkeley Lane
Moreland Hills, Ohio 44022

Mr. Randy Primozic
Northeastern Refrigeration Corp.
8274 Western Parkway
Willoughby, Ohio 44094

Mr. Jack Novosel
Grinnel Fire Protection
1294 East 55th Street
Cleveland, Ohio 44103

Mr. Harry A. Hattenbach
The Hattenbach Co.
1929 East 61st Street
Cleveland, Ohio 44103

Mr Richard Page
Industrial Power Piping, Inc.
68 Lincoln Avenue
Berea, Ohio 44017

Mr. John Vavrek
JOPA Mechanical, Inc.
8085 West Ridge Drive
Broadview Hts., Ohio 44147

Ms. Jo Ellen Kehoe
Kiley, Inc.
30815 Solon Road
Solon, Ohio 44139

Ms. Lavenia Ferguson
Logical Services, Inc.
4614 Prospect Avenue
Prospect Park Bldg. #302
Cleveland, Ohio 44103

Mr. Melvin Finch
M & R Mechanical Contrs., Inc.
11512 Superior Avenue
Cleveland, Ohio 44106

Mr. Edward M. McCabe
McCabe Engineering Corp.
5471 E. Wallings Road
Brecksville, Ohio 44141

Mr. Ronald R. Bassak
Meccon, Inc.
613 East Crosier Street
Akron, Ohio 44311

Mr. Donald C. Morton
A.D. Morton Co., Inc.
4495 Hamann Parkway
Willoughby, Ohio 44094

Mr. Dan Ogrinc
Ogrinc Mechanical Corp.
26650 Emery Industrial Pkwy.
Warrensville Hts., Ohio 44128

Mr. Joseph Gyorky
Gyorky Plumbing & Heating Co.
13920 Enterprise Avenue
Cleveland, Ohio 44135

Mr. Jim McAuley
Honewell, Inc.
925 Keynote Circle
Brooklyn Hts., Ohio 44131

Mr. Joe R. Ledford
J.R. Mechanical, Inc.
2100 Abbeyville Road
Valley City, Ohio 44280

Mr. Sandy Kaplan
Kaplan Mechanical Corp.
20170 Miles Pkwy.
Warrensville Hts, Ohio 44128

Mr. Terry Doyle
Landis & Gyr Powers, Inc.
7700 Hub Pkwy.
Valley View, Ohio 44125

Mr. Jim Lorig
Lorig Mechanical, Inc.
2317 Pearl Road
Medina, Ohio 44256

Ms. Dolores McKinely
Mac Mechanical Corp.
1361 Chardon Road
Euclid, Ohio 44117

Mr. Bill Lemanski
McCarl's Inc.
1413 9th Avenue
Beaver Falls, PA 15010

Mr. Raymond Meyers
Meyers Fire Protection
P.O. Box 809
Chesterland, Ohio 44026

Mr. Joseph V. Chaplik
North Shore Mechanical Contractors, Inc.
3274 W. 67th Place
Cleveland, Ohio 44102

Mr. James Palsey
Ohio Independent Sprinkler
P.O. Box 41145
Brecksville, Ohio 44141

Mr. Art Hugo
Piping Control Systems
11290 Berea Road
Cleveland, Ohio 44102

R & D Heating & Sheet Metal
P.O. Box 142
3420 Clark Road
Perry, Ohio 44081

Mr. Dennis G. Gant
Ramsey-Bennett Co.
25020 Lakeland Blvd.
Euclid, Ohio 44132

Mr. Wm. N. Neiheiser
Reliance Mechanical Corp.
1975 Hamilton Avenue
Cleveland, Ohio 44114

Mr. Robert K. Grisdale
Ryan Mechanical, Inc.
37082 Beech Hills Dr.
Willoughby Hills, Ohio 44094

Mr. Thomas H. McClave
Lawson Equipment Co., Inc.
792 E. 40th Street
Cleveland, Ohio 44103

Mr. David Nachman
Cohn Corp.
1775 East 45th Street
Cleveland, Ohio 44103

Mr. Tom Filarski
Thomas Mechanical, Inc.
7933 Marion Parkway
Brunswick, Ohio 44212

Mr. Joe D. McNeill
Clark International Corp.
1000 Bank Street
Valley View, Ohio 44125
9/23/92
9/23/92

Robert A. Durand
C. Coults, INc.
290 Wall St.
P.O. Box 435
Axom, MI 48393

Akron Fire Protect.
196 Yuma Circle, N.W.
Uniontown, Ohio 44685

Mr. Tom James
Price & James Htg. &
Refrigeration Co.
666 Front Street
P.O. Box 96
Berea, Ohio 44017

Mr. M.S. Rubin
R & M Heating & Air
Conditioning
1209 EAst 33rd Street
Cleveland, Ohio 44114

M. P. Redmond
M.A. Redmond
7901 Old Rockside Road
Cleveland, Ohio 44131

Mr. Samuel Roth
Roth Brothers
325 Treeworth Blvd.
Broadview Hts., Ohio 44147

Ms. Maryanne P. Schneider
The Schneider Co. Air
Conditioning Contrs., Inc.
7464 Serio Drive
Independence, Ohio 44131

Mr. Gary Y. Klie
Smith & Oby Company
6107 Carnegie Avenue
Cleveland, Ohio 44103

Mr. James McMillen
Stevens Painton Corp.
10245 Brecksville Road
Brecksville, Ohio 44141

Mr. William P. Vadakin
Vadakin Refrigeration & Air
Cond., Inc.
1240 E. 286th Street
Euclid, Ohio 44132

Mr. Jack A. Grattan
G.P.M. Corporation
22100 Mastick Road
Fairview Park, OH 44126

A.C.R. International
52882 New London E. Rd.
New London, Ohio 44851

John Magana
Bd. of Cuyahoga Cnty Comm.
208 St. Clair Ave.
Cleveland, Ohio 44113

Ms. Faye E. Prince
Prince Air Cond. And Htg., Inc.
14811 Sylvia Drive
Brookpark, Ohio 44142

Mr. Rich Molina
RAM Mechanical, Inc.
8367 Kirkwood Drive
Chesterland, Ohio 44026

Mr. Mike Brown
Reliable Sprinkler Protection,
Inc.
1433 East 329th Street
Eastlake, Ohio 44095

Ms. Patricia M. Grisdale
Ryan Mechanical, Inc.
37082 Beech Hills Dr.
Willoughby Hills, Ohio 44094

Mr. Dennis J. Clark
Schweizer Dipple, Inc.
3380 West 137th Street
Cleveland, Ohio 44111

Mr. Richard R. Hoffman
The Soehnlen Piping Co., Inc.
4620 Johnston Parkway
Cleveland, Ohio 44128

Mr. Ray Zetts
Superior Piping Contractors
Inc.
P.O. Box 25649
Cleveland, Ohio 44125

Mr. Kent Randall
Viking Refrigeration
15145 Lorain Avenue
Cleveland, Ohio 44111

Mr. John McNulty
G.P.M. Corporation
22100 Mastick Road
Fairview Park, OH 44126

Robert C. Ray
Aerotech Mechanical
574 McClurg Rd.
Youngstown, Ohio 44512

Ronnie Kayser
Carrier Bldg. Svc&Sys/Midwest
13941 West Pkwy.
Cleveland, Ohio 44135

BEST AVAILABLE COPY

Frank Yuhas, Jr.
Climate Service Co.
P.O. Box 31025
Cleveland, OH 44131

Mark Harris
E.K. Betz, Inc.
10351 Norwalk Rd.
Litchfield, OH 44253

Pat Morey
Kuempel Service
3976 Southern Ave.
Cincinnati, OH 45227

Gary Franklin
Metsec Industries
[illegible]-A Coffey Lane
[illegible]ta Rosa, CA 95403

Michale Hilbert
Rabe Environmental Syst.
2300 West 23 St.
Erie, PA 16506

Translogic Corp.
1935 Techny Rd.
Suite #18
Northbrook, IL 60062

Mary Ann Bartell
Continual Air, INc.
686 Jefferson St.
Bedford, OH 44146

Scott Forbes
Environmental Mech.
570 Sandra Dr.
Brunswick, OH 44212

Robert Morris
Liberty Piping
P.O. Box 14988
Cleveland, OH 44114

Tim Reddington
Nuclear Power Service
5530 Derry St.
Harrisburg, PA 17111

Rockwell International
700 Oakmont Lane
Westmont, IL 60559

Dianne Donnelly
Welding Services, Inc.
2225 Skyland Ct.
Atlanta, GA 30071

Linda Schilling
Crest Energy Services
10774 Reservoir Dr.
Mantua, OH 44255

Ernie Nichols
Fire Foe Corp.
999 Trumbull Ave.
Girard, Ohio 44420

C. Robert Rudolph
Master Mechanical
16759 Park Circle Dr.
Chargin Falls, OH 44022

Dominic Ozanne
Ozanne Construction
1635 East 25th St.
Cleveland, OH 44114

Traditional Bld. Systems
(NO ADDRESS)

Appendix D

APPENDIX E — CONSENT DECREE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED AND FILED JANUARY 20, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION
NO. c68-473

JUDGE THOMAS

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL NO. 120; PIPE FITTERS JOINT APPRENTICESHIP AND TRAINING COMMITTEE; PIPE FITTERS JOINT HIRING COMMITTEE; MECHANICAL CONTRACTORS ASSOCIATION OF CLEVELAND, INC.; AND REFRIGERATION AND AIR-CONDITIONING CONTRACTORS ASSOCIATION OF CLEVELAND,

Defendants.

CONSENT DECREE

Appendix E

The United States of America, plaintiff, initiated this suit on June 28, 1968, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq.

This Order, being issued with the consent of the parties prior to the introduction of any evidence, does not constitute an adjudication or finding that there has been a violation of said Act, and shall in no manner be construed as an admission by the defendants of any past discriminatory practices.

By agreement of the parties and on the representations of their respective counsel, the Court having duly considered same,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I.
General

1. The defendants, their officers, members, agents, employees, successors and all persons and organizations in active concert or participation with them are enjoined from excluding any individual from membership in defendant United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local No. 120 (hereinafter referred to as "Union"), or in any way limiting, segregating or classifying or otherwise adversely affecting his status as an employee or as an applicant for employment because of such individual's race or national origin.

Appendix E

2. The Union shall receive and process applications, refer for employment, and otherwise administer the affairs of the Union so that no individual is excluded from work opportunities on the basis of his race or national origin.

II.

The Work Referral System

3. Except as provided in this Order, the Union shall refer applicants for employment according to the procedures established in the collective bargaining agreement of May 1, 1970. No requirements or conditions for referral shall be imposed other than those set forth in the collective bargaining agreement as modified by this Order.

4. (a) Within 90 days after the entry of this decree the Union shall file with the Court and serve on the plaintiff a brief statement of the operation of its work referral system described below. The Union shall furnish, on request, a copy of the statement to each applicant for referral.

(b) The Union shall provide and maintain for each person seeking referral for employment a master registration card which shall set forth his name, address, telephone number, social security number, date of birth, race, category, specialty, status as a member, and if a member of a local union of the United Association other than the Union, the number of that union, date and time of each registration for referral, and special skill.

(c) Whenever an individual is referred for employment, there shall be noted on his master registration card the date of referral, name of employer to whom referred, and classification of referral.

(d) Negro applicants for referral shall be placed in referral Groups I and II in accordance with the following provisions:

Group I — All Negroes who are residents within the geographical area constituting the Union's normal construction market and (1) have a minimum of five (5) years' experience and/or training at the pipefitting trade and/or related trades as a journeyman, apprentice or permit man in the building and construction industry and have successfully passed the competency examination for journeyman membership referred to in paragraph 11(b), below; or (2) have successfully served an apprenticeship at the trade under an apprenticeship program approved by the United States Bureau of Apprenticeship Training, or State Division of Apprenticeship Training or State Division of Apprenticeship Standards; or (3) have completed training as journeyman-trainees under the UA-NCA Journeyman Trainee Program; or (4) have had previous employment as a journeyman pipefitter with a contractor and whose services have proved satisfactory.

Appendix E

Group II (A) Any Negro who has had five (5) years' working experience and/or training at the pipefitting trade and/or related trades but who has not passed any competency examination as to his skill or competency shall be accepted for registration, but except as provided in paragraph 5, below, he shall not be dispatched until he passes the competency examination for journeyman membership referred to in paragraph 11(b), below. If at such time he passes the examination he is a resident within the geographical area constituting the Union's normal construction market, he shall be advanced to Group I as of that time.

(B) Other Negro persons who are qualified to be referred for employment as journeymen.

All Negroes with less than five (5) years' actual practical working experience and/or training at the pipefitting trade and/or related trades shall be referred for qualification, training and placement to the UA-NCA Journeyman-Trainee Program created by the contract between the Union and the Mechanical Contractor's Association of Cleveland, Inc., as approved by the United States Department of Labor, and all Negroes admitted as journeyman-trainees under that program who successfully complete the training required shall be advanced to full

journeyman status in accordance with the terms of that program; in addition any person who has completed 18 months' training as a journeyman trainee shall be permitted to take the competency examination for journeyman membership referred to in paragraph 11(b), below, and if he passes said examination shall be admitted to journeyman membership.

(e) Other applicants for referral shall be placed in referral Groups I and II in accordance with the following provisions:

Group I — Residents of the area within the Union's jurisdiction who have five years' experience at the pipefitting trade for employers signatory to or abiding by collective bargaining agreements between the Union and the defendant Associations.

Group II (A) Any person who has had five (5) years' working experience and/or training at the pipefitting trade and/or related trades but who has not passed any competency examination as to his skill or competency shall be accepted for registration, but except as provided in paragraph 5, below, he shall not be dispatched until he passes the competency examination for journeyman membership referred to in paragraph 11(b), below.

Appendix E

(B) All other persons who are qualified to be referred for employment as journeymen.

5. (a) The Union shall maintain a referral register containing the priority groups identified in paragraph 4(d) and (e). Applicants for referral shall be placed in the highest priority group for which they are qualified in the order of their application. Referrals for work from the out-of-work register for Group I shall be made in the order in which applicants' names appear in the register. The Union shall indicate beside the applicant's name the date and time of referral and the name of the contractor to whom he is referred. The portions of the register for Group II shall be broken down by race. Referrals of persons in this group shall be made with the objective of meeting the admission goals set forth in paragraph 10, below, to the extent applicants are available for work.

(b) Referrals of persons in Group II shall be made only when the list for Group I is exhausted. When a referral is to be made from either racial group on the Group II list and the only applicants on the list from that racial group are those who have not yet passed the competency examination, the earliest applicant shall be dispatched notwithstanding the fact that he has not passed the test. He will have four months to take and pass the test. In the event he does not pass the test during that period, he will be terminated by the contractor employing him, and be referred to the UA-NCA program for placement and training. He will be advanced to journeyman and admitted to membership in accordance with the requirements of that program. A Group II applicant may be referred without having passed the competency test on

only one occasion. The Union will cooperate with the UA-NCA operations committee and co-ordinator in securing employment for the Negroes in that program and with the Joint Apprenticeship Committee in securing employment for apprentices. Persons may be referred in other than the manner set forth in this paragraph in the event of an employer's special requests for key men, former employees, and men with special skills pursuant to Article VII, §§4a, 4b and 4c of the collective bargaining agreement between the Union and the defendant contractors' associations, and, in order to meet manning table requirements.

6. Effective with the date of the entry of this order, no person not then employed by a member of the contractors' associations or by any other contractor signatory to or abiding by a collective bargaining agreement between the Union and signatory contractors shall work for such member or other contractor as a pipefitter without first making an application to the Union for referral as a pipefitter and being referred by the Union. All applications for referral shall be accepted by the Union's hiring hall between the hours of 8:00 A.M. and 1:00 P.M., Monday to Friday inclusive. Each person so referred shall be furnished a referral slip for such work from the Union. The slip shall set forth as to such person his name, social security number, the date on which and contractor to whom he is referred, and his classification. A carbon copy of each such slip shall be made and retained at the office of the Union for a period of one year.

7. Requests for referral of employees through the Union shall be made in writing specifying the number of journeymen and journeyman-trainees required; provided, that

a request for referral of employees may be made orally by an employer, subject to later confirmation in writing as above provided within not more than three business days thereafter.

8. Whenever a person is passed over in the referral register for lack of contact or otherwise, he shall retain his place in the referral register.

III.
Membership

9. All persons admitted as journeyman-trainees shall have served a six-month probation period. In the event it is determined by the Operations Committee of the UA-NCA Plan, that any person so admitted does not possess the qualifications necessary to work at the trade, such person shall be terminated.

10. (a) During the period ending December 31, 1975, the defendants shall take steps to ensure that Negro journeymen, journeyman-trainees under the UA-NCA Journeyman Trainee Program and apprentices indentured into the apprenticeship program administered by the Joint Apprenticeship Committee are admitted to membership in numbers sufficient to meet the goals set forth in this paragraph and elsewhere in this Order.

(b) The intermediate and over-all goals to be attained are for Negro journeyman members, journeyman-trainees and apprentices in

training to constitute at least the following percentages of the average number of active local union members in the geographical area covered by the Union Equal Employment Plan for the Construction Industry during the year ending with the date indicated:

March 31, 1972 — 3.4%
December 31, 1972 — 6.8%
December 31, 1973 — 10.2%
December 31, 1974 — 13.6%
December 31, 1975 — 17.0%

Provided, however, that as of December 31, 1975, there shall be a minimum of 275 Negro journeymen, journeyman-trainees and apprentice members; and provided further, the goal of the Union shall be the admission of 55 Negroes during each of the calendar years 1972 through 1975, inclusive, as journeymen, journeyman-trainees, and apprentices. The admission of more than this number of Negroes in any one calendar year shall not be the reason to accelerate the percentage ratio set forth above. Each Negro admitted initially as journeyman-trainees under the UA-NCA Program shall be advanced to journeyman and admitted to membership in accordance with the requirements of that program.

Appendix E

11. (a) The Union will not restrict the size of its membership in order to defeat the percentage goals set forth in this decree but will maintain, insofar as practicable, the total membership consistent with normal requirements of the pipefitting industry for full employment of journeymen and apprentices.

(b) Applicants for journeyman membership shall be required to take and pass a practical test. The test administered to each applicant shall be objective and designed to test the ability of the applicant to perform the duties normally required of journeymen on a daily basis in the specialty in the trade for which he is applying. The tests for each specialty shall be no more difficult than the least difficult tests administered prior to July 2, 1965, nor shall the standards of eligibility for taking the tests and for the grading thereof be more stringent than the minimum standards in effect prior to July 2, 1965. Each test shall be based on recognized manuals on the particular specialty involved.

(c) Within 90 days after the entry of this Order, the Joint Hiring Committee shall serve on the other parties samples of each of the tests they intend to administer to journeyman applicants, and the names of the manuals

upon which they are based, and the other parties to this cause of action will have 30 days thereafter within which to file objections to the proposed tests. Except to the extent necessary in connection with a hearing or conference in this case, there shall be no disclosure of the examinations to any persons other than their attorneys, clerical employees working under their attorneys' supervision, and experts who are not engaged in advising applicants for the pipefitting trade whom attorneys consult for purposes of this case.

(d) The journeyman examination shall be administered at least once every three months, and monthly when there are 10 or more applicants. At least two weeks prior to administering an examination, the Joint Hiring Committee shall give each applicant and the Workers Defense League of Cleveland, Ohio, written notice by first class mail of the time and place of the examination as well as a description of the nature of the examination, sample of the kinds of questions to be asked and/or tasks to be performed, and the title of the manual on which the questions in the examination will be based. If the Committee intends to make material changes in any of the journeyman examinations, it shall give the other parties 30 days' notice, and the other

parties will have 20 days thereafter within which to file objections to the proposed changes in any test. Examinations shall be graded promptly after the session at which they are administered, and the applicants shall be advised of their grades by registered or certified mail within 14 days from the date of the examination. Failure on an examination shall not prejudice an applicant's right to retake it six months later or at another subsequent time, but not more often than three examinations, and he shall be informed of this right.

IV.

Miscellaneous

12. The defendants shall have the affirmative obligation to work with the Workers' Defense League of Cleveland, Ohio, and other organizations representative of the Negro community, to obtain Negroes to fulfill the goals set forth herein. Defendants shall have a continuing obligation to develop and implement a program to attract interested Negroes through notices in newspapers, radio and television, and through appropriate communications with appropriate civil rights groups and traditionally Negro schools in the area.

13. Within 30 days after the date of the entry of this Order, each member of defendant contractors' associations shall file with the Court and serve upon all counsel a report setting forth the name, race, social security number, classification and rate of pay of each of the persons employed by them as journeymen, journeyman-trainees and apprentices as of that date.

14. Within 30 days after the end of the calendar month during which this order is entered, and within 30 days after the end of each calendar month thereafter, each contractor employing members of the Union shall file with the Court and serve upon all counsel a copy of the form presently in use for reporting contributions to the fringe benefit funds for such calendar month, setting for the name, social security number, race, classification as a journeyman or journeyman-trainee or apprentice, status as a member or traveler or permit man, rate of pay and the number of regular hours, overtime hours and total hours worked by each person employed as a pipe fitter subject to the jurisdiction of the Union. With respect to any employee who has entries in the "starting this month" and/or "terminated this month" columns, the date or dates on which said employee started and/or was terminated shall be set forth. Counsel for plaintiff shall have the right to inspect at reasonable times any contractor's payroll and other records showing jobs and hours worked and the dates thereof by each of the persons named on one of that contractor's reports.

15. Within 30 days after the end of the calendar quarter during which this order is entered and within 30 days after the end of each calendar quarter thereafter, the Union shall file with the Court and serve upon all counsel reports setting forth the following:

(a) A summary report setting forth the total hours worked by status as members, travelers or permit men, by race, and by classification as journeymen, journeyman-trainees and apprentices, by race, both during the preceeding quarter, and cumulatively during the period since the entry of this Order.

(b) As to each man issued a referral slip during the previous quarter, his name, social security number, race, date of registration, contractor and job to which referred and the date of referral; his status as a member or permit man or traveler, and if a traveler, the number of the local union with which he is affiliated; his specialty; the classification under which he was referred.

(c) The name, race, and classification of each Negro person passed over in the out-of-work register during the preceeding quarter for lack of contact and the reason therefor. When a person was passed over because he was not contacted the report shall indicate what attempts at contact were made and the reason for failure to contact.

(d) The name, race, and social security number of every person admitted to membership or indentured as an apprentice during the preceeding quarter, and of every person whose membership and employment was terminated by the Committee responsible therefor during the quarter. As to each person so terminated, the report shall set forth the date of and reason for termination.

(e) The name, race, social security number, specialty, and date and results of examination of every person administered a journeyman's examination during the preceeding quarter.

16. Counsel for the plaintiff shall have the right at its cost to inspect and copy during normal business hours all

records maintained by the Union pursuant to this Order or otherwise which reflect membership and/or employment within the area of the Union's jurisdiction.

17. Counsel for the plaintiff shall have the right at its cost to inspect and copy or obtain in their entirety copies of all machine-readable records, together with programs and documentation relating thereto, maintained by the defendants or any pension or welfare committee to which they are party.

18. On or before April 1, 1972, the Union shall file with the Court and serve upon all counsel a report setting forth the following:

(a) A cumulative list broken down by classification as journeymen, journeyman-trainees and apprentices, of all persons admitted to membership from July 2, 1965 to March 1, 1972, setting forth each person's name, race, social security number, and date of admission.

(b) A list of all Negro persons whose applications for membership in the Union were pending as of March 1, 1972, setting forth each such person's name, date of birth, social security number, date of application, and classification as journeyman, journeyman-trainee or apprentice applicant.

(c) A list of all Negro persons who applied for but were rejected for membership in the Union subsequent to the entry of this Order and prior to March 1, 1972, setting forth each such person's

name, date of birth, social security number, date of application, date of and reason for rejection and date of notification of rejection.

(d) A report setting forth the steps taken to carry out the public information program described in paragraph 12, above, said report to include copies of newspaper and other printed advertisements and information as to the dates and place of publication or distribution thereof.

19. The defendants shall administer their affairs, so as to provide to Negroes opportunities for membership, referral and employment, which are equal to those provided whites, and shall see that job opportunities are made available to journeyman-trainees and apprentices so that the programs for persons in those categories may be maintained at the maximum feasible levels.

This Court shall retain jurisdiction of this action until the further order of the Court.

Rendered this 20th day of January, 1972.

s/ William K. Thomas
UNITED STATES DISTRICT JUDGE

Appendix E

APPROVED:

s/ Hubert Goldsmith, Jr.
Attorney for the United States

s/ Mortimer Riemer
Attorney for the Union

s/ Richard V. Whelan, Jr.
Attorney for the Mechanical Contractors' Association of Cleveland, Inc.

s/ Chester DiLodegran
Attorney for the Refrigeration and Air Conditioning Contractors' Association of Cleveland.

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 11, 2001

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

98-3935/3986/3987/3988

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

GEORGE D. EDWARDS, ET AL.,

Intervening Plaintiffs-Appellants,

v.

UNITED ASSOCIATION OF JOURNEYMAN AND APPRENTICES OF THE PLUMBING & PIPEFITTERS INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL NO. 120, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: KEITH, SILER, and BATCHELDER, Circuit Judges.

Appendix F

The court having received a petition for rehearing en banc from Appellants, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

Further, the Equal Employment Opportunity Commission has requested a panel rehearing to clarify our decision to show that the district court order of June 25, 1998, did not alter the previous contempt findings embodied in the final judgment of December 22, 1992. That motion is granted, so that our decision does not alter the previous contempt findings embodied in the final judgment of December 22, 1992. Therefore, when these cases are remanded to the district court, it will be up to that court to decide how to proceed under the circumstances consistent with our decision.

ENTERED BY ORDER OF THE COURT

By: s/ Leonard Green
Leonard Green, Clerk

APPENDIX G — CONSTITUTIONAL PROVISION, RULES AND STATUTES INVOLVED

Const. amend V provides:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . .

Federal Rule of Civil Procedure 19(a) provides:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party . . . .

Federal Rule of Civil Procedure 21 provides:

> Misjoinder of parties is not grounds for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on

> such terms that are just. Any claim against a party may be severed and proceeded with separately.

Section 2000e-5(g)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g)(1), provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, ...

Section 2000e-2(c)(1) and (c)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c)(1) and (c)(2), provides:

> It shall be an unlawful employment practice for a labor organization—
>
> > (1) to . . . discriminate against, any individual because of his race . . . ;
> >
> > (2) to . . . fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or applicant for employment, because of such individual's race . . . .

Supreme Court, U.S.
FILED
SEP 12 2001
CLERK

(2)

No. 01-71

In the Supreme Court of the United States

HONEYWELL, INC., AND JOHNSON CONTROLS, INC.,
PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

NICHOLAS M. INZEO
Acting Deputy General Counsel

PHILIP B. SKLOVER
Associate General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

ROBERT J. GREGORY
Senior Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether the district court's joinder of petitioners as defendants pursuant to Federal Rule of Civil Procedure 19(a), in order to ensure complete relief to respondents, violated their due process rights.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Associated Dry Goods Corp. v. *Towers Fin. Corp.*, 920 F.2d 1121 (2d Cir. 1990)	7
Dimond v. *Retirement Plan for Employees of Michael Baker Corp. & Affiliates*, 582 F. Supp. 892 (W.D. Pa. 1983)	7
Local No. 93, Int'l Ass'n of Firefighters v. *City of Cleveland*, 478 U.S. 501 (1986)	5, 7, 9, 10
Martin v. *Wilks*, 490 U.S. 755 (1989)	5, 8, 9
United States v. *Keystone Sanitation Co.*, 903 F. Supp. 803 (M.D. Pa. 1995)	7

Statute and rule:

Civil Rights Act of 1991, 42 U.S.C. 2000e *et seq.*:	
§ 108, 42 U.S.C. 2000e-2	8
§ 108(n)(1), 42 U.S.C. 2000e-2(n)(1)	8
Fed. R. Civ. P.:	
Rule 19	8, 9
Rule 19(a)	3, 6, 7, 11
Rule 19(a)(1)	7
Rule 19 advisory committee's note (1966 amend.)	6

In the Supreme Court of the United States

No. 01-71

HONEYWELL, INC., AND JOHNSON CONTROLS, INC., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 235 F.3d 244. The order of the court of appeals disposing of the rehearing petitions (Pet. App. 101a-102a) is reported at 249 F.3d 1085. The pertinent orders of the district court (Pet. App. 65a-82a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24a-25a) was entered on December 15, 2000. Petitions for rehearing were denied on April 11, 2001 (Pet. App. 101a-102a). The petition for a writ of certiorari was filed on July 10, 2001. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of an action brought in 1968 by the Equal Employment Opportunity Commission (EEOC) against the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local No. 120 (Local 120). Local 120 operated a hiring hall to refer employees, principally pipefitters, to employment with contractors with which Local 120 had a collective-bargaining relationship. The EEOC's action alleged that Local 120 had engaged in unlawful racial discrimination in the operation of its hiring hall. A multi-employer contractor association with which Local 120 had a collective-bargaining relationship, the Mechanical Contractors Association (MCA), intervened as a defendant in the action. See Pet. App. 3a-4a; Pet. 3.[1]

In 1972, EEOC entered into a consent decree with Local 120 and the MCA. That decree required Local 120 to operate a register for referral of employment requests in a manner designed to prevent racial discrimination in the referral process. See Pet. App. 85a-91a. In addition, to ensure Local 120's compliance with that obligation and to allow the parties to confirm such compliance, the consent decree required contractors employing members of Local 120 to make written requests for referrals of employees (in Paragraph 7), and to submit monthly reports containing information on union members employed during the reporting period and to allow reasonable inspection of their

---

[1] Petitioners are not members of the MCA, although they are members of the Pneumatic Control Systems Council, which has a collective-bargaining agreement with Local 120's parent union. See Plaintiff-Intervenors' C.A. Br. 3-5.

payrolls by counsel for the plaintiffs (in Paragraph 14). *Id.* at 90a-91a, 96a.

2. By 1990, EEOC had determined that Local 120 had not complied with the terms of the consent decree, and moved for an order to show cause why Local 120 should not be held in contempt for failure to comply with the decree. The district court found Local 120 in civil contempt because of its failure to maintain a referral register or to use registration cards as required by the decree. See Pet. App. 29a-30a, 74a-75a.

In addition, EEOC believed that the record-keeping obligations that had originally been imposed on the contractors that were already effectively parties to the case, through the MCA, were insufficient to ensure effective relief.[2] Accordingly, EEOC moved for certification of a defendant class of contractors who employed members of Local 120. See Pet. App. 73a.

The district court declined to certify the class, but determined that certain contractors who employed members of Local 120 should be joined as defendants, pursuant to Federal Rule of Civil Procedure 19(a). The court first found that "the contractors which utilize the referral services of Local No. 120 have not been complying with the provisions of Paragraph 7 and Paragraph 14." Pet. App. 75a. The court then determined that "the joinder of each contractor is required to secure compliance with the provisions of Paragraphs 7 and 14," that "joinder of each contractor using the services of the hiring hall of Defendant Local 120 is necessary to avoid the imposition of inconsistent obligations on the parties to these proceedings and to insure that

---

[2] By the time of the contempt proceeding against Local 120, MCA represented only 25% of the contractors using Local 120's hiring hall. C.A. App. 334.

complete relief is granted prospectively" to the plaintiffs, and that "[c]ompliance with the provisions of Paragraph 7 and Paragraph 14 * * * by those contractors which utilize the hiring hall operated by Local No. 120 is essential to the successful operation of the Consent Decree." *Ibid.* The court directed that certain contractors be joined as defendants, directed that its order be served, with a summons, on those contractors, and provided each contractor with the opportunity to file a responsive pleading to show why it should not be joined in the action. *Id.* at 76a-77a. Petitioners then filed a motion arguing that they should be dismissed from the case. They contended that their joinder was not necessary to effect enforcement of the decree. C.A. App. 364-376. The court subsequently heard argument and ruled that joinder was proper. C.A. App. 384-402.

The court also modified the terms of the consent decree to delete the requirement that copies of monthly employment reports be filed by contractors with the court and counsel. Rather, the court directed that contractors keep copies of those forms and permit inspection and copying of those forms by counsel at reasonable times. Pet. App. 66a-67a.

3. After further proceedings, petitioners appealed the district court's order joining them as defendants. The court of appeals affirmed that joinder order. Pet. App. 17a-20a. The court of appeals observed that, absent joinder of the individual contractors who employed members of the union, "the Union's compliance with the decree, especially in light of the individual claims and lax reporting and record-keeping, was impossible to gauge when non-party contractors hired union workers." *Id.* at 20a. That consideration, as well as "the need to modify the decree as a result of the Union's alleged contempt," justified "the district court's

concern that 'complete relief' could not be attained without joining [petitioners]." *Ibid.*

The court also rejected petitioners' argument that "subjecting them to the consent decree, to which they did not consent," constituted a due process violation. Pet. App. 18a. The court found inapposite this Court's decisions in *Martin* v. *Wilks*, 490 U.S. 755 (1989), and *Local No. 93, International Association of Firefighters* v. *City of Cleveland*, 478 U.S. 501 (1986), which were invoked by petitioners in support of the contention that, as a matter of due process, the court could not impose affirmative obligations on them without either their agreement to the terms of a consent decree or a judicial determination of their liability. As the court of appeals explained:

> The district court joined these defendant contractors to ensure complete relief on a prospective basis regarding the record-keeping and reporting requirements of the consent decree. The joinder of [petitioners] was not violative of procedural due process. Their joinder did not subject them to liability for past conduct. They are not being deprived of legal rights by a retroactive application of the terms of the consent decree. The impact of joining [petitioners] is *de minimus* and prospective. The district court joined these defendants to enforce the decree against the Union, not for the binding effect it would have on [petitioners]. [Petitioners] were given notice and an opportunity to defend their positions when the EEOC moved to designate a class of defendant contractors that had utilized the Union's hiring hall.

Pet. App. 19a. Accordingly, the court of appeals ruled that the district court had not abused its discretion in

joining petitioners as defendants to the action. *Id.* at 20a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. This case concerns a straightforward application of the joinder provisions of Rule 19(a). Rule 19(a) provides that a person "shall be joined as a party in the action if," *inter alia*, "in the person's absence complete relief cannot be accorded among those already parties." Rule 19(a), moreover, permits the district court to order the joinder of third parties at "any stage of the action." See Fed. R. Civ. P. 19 advisory committee's note (1966 amend.). The district court determined in this case that respondents could not be afforded complete relief from Local 120 unless contractors that employed pipefitters referred by the union were required to make their requests for referrals in writing and to maintain limited employment records so that Local 120's compliance with the provisions of the consent decree could be confirmed. Pet. App. 75a. Petitioners do not question the soundness of that determination by the district court, which was specifically upheld by the court of appeals. *Id.* at 20a.

Petitioners question the district court's authority to join them as defendants without their consent or a determination that they are liable for past discrimination. Pet. 9. In fact, Rule 19(a) authorizes a court to join a person as a defendant to ensure that complete relief is granted to a plaintiff, even when the person so joined is not primarily or directly responsible for the claimed injury to the plaintiff. See, *e.g.*, *Associated Dry*

Goods Corp. v. *Towers Fin. Corp.*, 920 F.2d 1121, 1124 (2d Cir. 1990) (allowing joinder of landlord because otherwise, the defendant sublessee "would not be able to obtain full injunctive relief on any counterclaim it asserts against [sublessor]"); *United States* v. *Keystone Sanitation Co.*, 903 F. Supp. 803, 815 (M.D. Pa. 1995) (concluding that joinder of cross-claim defendants was "necessary to effectuate the injunctive relief to which the [parties seeking joinder] are entitled"); *Dimond* v. *Retirement Plan for Employees of Michael Baker Corp. & Affiliates*, 582 F. Supp. 892, 897 (W.D. Pa. 1983).

In this case, moreover, the court did not subject petitioners to liability for their past conduct, nor did it apply the terms of the consent decree retroactively. Rather, the court joined petitioners, in the course of entering judgment on a contempt motion, to ensure Local 120's future compliance with the provisions of the consent decree. Pet. App. 75a. That joinder represents a wholly proper application of Rule 19(a)'s authorization of joinder when "in the person's absence complete relief cannot be accorded among those already parties." Fed. R. Civ. P. 19(a)(1).

2. Although petitioners do not argue that the lower courts improperly applied Rule 19(a), they do contend that their joinder violated their due process rights. Petitioners rely principally on *Martin* v. *Wilks*, 490 U.S. 755 (1989), and *Local No. 93, International Association of Firefighters* v. *City of Cleveland*, 478 U.S. 501 (1986) (*Local 93*). As the court of appeals concluded, however (see Pet. App. 18a-19a), neither decision supports petitioners' argument.

In *Martin* v. *Wilks*, this Court addressed whether a group of white firefighters "were precluded from challenging employment decisions taken pursuant to [con-

sent] decrees, even though these firefighters had not been parties to the proceedings in which the decrees were entered." 490 U.S. at 758-759.[3] The Court held that the claims of the white firefighters were not barred by the fact that the firefighters had "failed to timely intervene in the initial proceedings" that led to the consent decree. *Id.* at 762. In reaching that conclusion, this Court stressed that the white firefighters had never been made parties to the initial litigation, and observed that, under the Federal Rules of Civil Procedure (including Rule 19 in particular), "a party seeking a judgment binding on another cannot obligate that person to intervene; *he must be joined.*" *Id.* at 763 (emphasis added). As the Court explained, "Rule 19's provisions for joining interested parties are designed to accommodate the sort of complexities that may arise from a decree affecting numerous people in various ways," *id.* at 767, and "[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Id.* at 765.

---

[3] As the court of appeals noted, some aspects of this Court's decision in *Martin* v. *Wilks* have been affected by Section 108(n)(1) of the Civil Rights Act of 1991, 42 U.S.C. 2000e-2(n)(1), which limited the circumstances in which a consent decree may be challenged by a person that had actual notice of the proposed decree or whose interests were adequately represented at the time of entry of the decree. That provision became effective on November 21, 1991. See Pet. App. 18a. n.2. The court of appeals determined, however, that Section 108 "is not to be applied retroactively" and thus does not apply "to the present case." *Ibid.* The district court also made no determination whether petitioners would be barred by Section 108 from challenging the consent decree. We therefore assume *arguendo* that Section 108 does not apply to this case.

In this case, the lower courts followed precisely the course of action indicated by this Court's decision in *Martin*. The district court did not subject petitioners to the terms of the 1972 consent decree for any period before their joinder. The court imposed only prospective obligations on petitioners, and only after they were served with a summons in the litigation and given an opportunity to be heard. This is not a case, therefore, in which a person was "deprived of his legal rights in a proceeding to which he [was] not a party." *Martin*, 490 U.S. at 759. Rather, this is a case in which persons were made a party to a legal proceeding under "the system of joinder presently contemplated by the Rules." *Id.* at 768. *Martin*, therefore, does not proscribe the district court's actions in this case; it endorses them.

Nor does the Court's decision in *Local 93* support petitioners. In *Local 93*, the Court rejected the contention that a consent decree entered in employment-discrimination litigation brought by a group of minority firefighters against their employer was invalid because the city firefighters' union, which had been permitted to intervene as of right in the litigation, opposed the decree. 478 U.S. at 528-530. The decree "imposed no legal duties or obligations on [the union]," *id.* at 511, and so the Court was not presented with any question about the propriety of third-party joinder to ensure complete relief under Rule 19. The Court did observe that "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement." *Id.* at 529. The Court also stated that a court may not "enter a consent decree that imposes obligations on a party that did not consent to the decree." *Ibid.* Those principles, however, simply mean that a court's

approval of a consent decree does not "dispose of the valid claims of nonconsenting" parties, and those claims "remain and may be litigated," including in proceedings on intervention or joinder. *Ibid.* In this case, the district court did not treat the original entry of the consent decree as having resolved petitioners' objections to the terms of that decree. Moreover, the court provided petitioners with a full opportunity to be heard prior to subjecting them to the reporting and record-keeping requirements of the decree, and petitioners filed a motion and presented argument. C.A. App. 364-376, 384-401. The district court's actions were therefore in keeping with *Local 93*.

3. Finally, we note that petitioners cite no evidence of any prejudice caused by the lower courts' actions. The requirements imposed by the joinder order are slight. The affected contractors are required merely to put requests for referrals in writing, or, if a request is made orally, to confirm the request in writing "not more than three business days thereafter." Pet. App. 74a. The contractors are also required to prepare and retain monthly reports containing information on the employees hired through Local 120.[4] *Ibid.* In joining petitioners, the district court specifically found that the requirements imposed upon petitioners (and other contractors) were not burdensome and did not prejudice any contractor in the operation of its business. C.A. App. 398. The court of appeals agreed that the burdens imposed upon petitioners were minimal. Pet. App. 19a.

---

[4] The district court has since eliminated the requirement that the contractors file monthly reports "with the Court and all counsel." Pet. App. 66a. The contractors need only include the relevant information in monthly reports that are already provided to Local 120 in the ordinary course of business. *Ibid.*

Petitioners' contention that the decision of the court of appeals provides the EEOC with the "unfettered right" to "bind innocent third parties" to consent decrees (Pet. 12) ignores the fact that district courts may and should take into account burdens on third parties in making joinder decisions. When the burden that would be imposed on the third party would be greater and the need to ensure complete relief less compelling, a court might well rule differently on whether joinder would be justified under Rule 19(a). In this case, the district court gave petitioners the opportunity to be heard on the issues of the need for joinder and the burdens placed on petitioners. After hearing argument, the court properly concluded that joinder of the contractors was necessary to ensure the enforcement of the consent decree, and that the burden imposed on those contractors was slight. Those determinations, which petitioners do not challenge, are sufficient to sustain the joinder decision in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NICHOLAS M. INZEO
Acting Deputy General Counsel

PHILIP B. SKLOVER
Associate General Counsel

LORRAINE C. DAVIS
Assistant General Counsel

ROBERT J. GREGORY
Senior Attorney
Equal Employment Opportunity Commission

SEPTEMBER 2001